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In the Supreme Court
OF THE
United States

October Term, 1973

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No.

FORD WHOLESALE COMPANY, INC., *Petitioner,*

vs.

FIBREBOARD PAPER PRODUCTS CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

LAW OFFICES OF JOSEPH L. ALIOTO,
JOSEPH L. ALIOTO,
JOSEPH M. ALIOTO,
PETER J. DONNICI,
111 Sutter Street, Suite 2100,
San Francisco, California 94104,
Telephone: (415) 434-2100.

BLECHER, COLLINS & HORCHER,
MAXWELL M. BLECHER,
HAROLD COLLINS,
612 South Flower Street, Suite 1206,
Los Angeles, California 90017,
Telephone: (213) 680-2644,
Counsel for Petitioner.

HANSEN & DOLLE,
VICTOR R. HANSEN,
606 South Olive Street,
Los Angeles, California 90014,
Telephone: (213) 628-1245,
Of Counsel.

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner, Ford Wholesale Company, Inc. (hereinafter "Ford") prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit (Court of Appeals No. 72-2570) entered in the above-entitled case on February 20, 1974. A petition for rehearing and suggestion for rehearing in banc was denied by the Court of Appeals on April 5, 1974.

OPINIONS OF THE COURTS BELOW

The judgment and opinion of the United States District Court for the Northern District of California, setting

aside a jury verdict of $100,000 in favor of plaintiff Ford and entering judgment notwithstanding the verdict in favor of defendant Fibreboard Paper Products Corporation ("Fibreboard") is reported as follows: *Ford Wholesale Company, Inc. v. Fibreboard Paper Products Corporation*, 344 F.Supp. 1323 (N.D.Cal., 1972) and a copy of that opinion is attached as Appendix A to this Petition.

The judgment and opinion of the United States Court of Appeals for the Ninth Circuit affirming the entry of judgment notwithstanding the verdict in the above entitled case is reported at ..... F.2d ....., 1974 CCH Trade Cases ¶ 74,940 (9th Cir. 1974). A copy of that opinion is attached as Appendix B to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on February 20, 1974. Petitioner Ford timely filed a petition for rehearing and suggestion for rehearing in banc which was denied by the Court of Appeals on April 5, 1974. (A copy of the order of the Court of Appeals is attached as Appendix C to this Petition.) The judgment and opinion of the Court of Appeals presents a significant issue as to the coverage of the federal antitrust laws and also creates a conflict among the Circuits with respect to the issue of an antitrust violation's affect on interstate commerce.

The jurisdiction of this Court is, therefore, invoked pursuant to 28 U.S.C. §1254.

QUESTION PRESENTED

The sole question is whether the courts below erred in ruling that interstate commerce was not involved in the defendant-respondent's anticompetitive conduct which otherwise constituted a violation of Section 1 of the Sherman Act?

STATUTES INVOLVED

(1) Section 1 of the Sherman Act (15 U.S.C. §1) provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

(2) Section 2 of the Sherman Act (15 U.S.C. §2) provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

STATEMENT OF THE CASE

(A) NATURE OF THE CASE

This is a private antitrust action for damages under Section 4 of the Clayton Act (15 U.S.C. §15). Plaintiff-petitioner Ford alleges that defendant-respondent Fibre-

board combined and conspired with various competitors of Ford to monopolize, attempted to monopolize and did monopolize trade and commerce in the relevant market in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2). (R. 4.)[1]

Ford is engaged in the business of marketing, selling and distributing roofing products throughout the San Francisco, California, Bay Area including the counties of Alameda, Contra Costa, San Mateo, Santa Clara, Monterey and San Francisco. (R. 433.) Fibreboard was, during the relevant period, in the business of manufacturing and selling PABCO roofing products to distributors such as Ford and the co-conspirators herein who are Ford's competitors.

The principal allegation in this case is that Ford's competitors induced and persuaded Fibreboard to refuse to sell or deliver roofing materials to Ford, a vigorous price-cutting competitor. (R. 436.) As a result of this alleged combination in restraint of trade, Ford suffered substantial financial losses. (R. 443-444.)

(B) THE COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

The complaint in this case was filed by Ford on November 10, 1966. (R. 1.) On or about July 28, 1970, defendant filed a motion for summary judgment. (R. 304, 307.) On October 20, 1970, after briefs were submitted and a hearing was held, the District Court denied the motion for summary judgment. (R. 422.)

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[1] "R." as used throughout this brief refers to the record on appeal. The number which follows refers to the page number in the record.

Trial commenced on October 26, 1971. (R. 1068.) At the conclusion of plaintiff's case, defendant moved for a directed verdict, *inter alia*, on the ground that plaintiff had failed to prove the requisite involvement with interstate commerce. (T. 803-820.) The District Court denied this motion. Thereafter defendant offered no evidence whatever to negate the interstate commerce evidence which plaintiff introduced. At the close of the trial, the jury returned a verdict in favor of plaintiff Ford in the amount of $100,000. (R. 645.) Defendant Fibreboard then filed its motion for judgment notwithstanding the verdict or, alternatively, for new trial. (R. 768.)

This motion was based on various grounds common to such motions. For example, defendant argued that the evidence was insufficient to support the finding of conspiracy and the determination of damages, that instructions were erroneous, etc. In its motion defendant also claimed that plaintiff had failed to establish the requisite involvement of interstate commerce. (R. 758-766.)

On May 30, 1972, the District Court entered judgment notwithstanding the verdict in favor of the defendant. (R. 1048.) The Court granted defendant's motion only on the interstate commerce ground. In all other respects, the defendant's motion was denied. (R. 1027.)

The unusual context in which the court decided the "interstate commerce" issue should also be noted. As the District Court recognized in its opinion (R. 1017-1018), the defendant contended that there was insufficient evidence for submission of the commerce issue to the jury; accordingly, defendant offered no jury instructions on

that issue. Thus, the question for the court was, merely, whether plaintiff had submitted sufficient evidence to satisfy the interstate commerce element. If, on a reading of the record, the evidence is sufficient for submission to the jury, then—in this case—plaintiff has satisfactorily established a restraint on interstate commerce.

Thus, the sole question presented by this petition is whether there was evidence from which the jury could have found that interstate commerce was involved in the defendant's anticompetitive conduct which otherwise constituted a violation of Section 1 of the Sherman Act (15 U.S.C. §1).

(C) STATEMENT OF FACTS

(1) The Background of the Case.

Ford, for several years prior to the damage period covered in the complaint, had been engaged in business as a distributor of roofing products in various counties in the San Francisco Bay Area. (R. 433.) Its principal place of business was in San Jose, California. Wholesale Building Supply, Inc. ("WBSI") and State Shingle Co. ("State") were competing distributors of roofing products serving much of the same market area both having their respective principal places of business in Oakland, California. (R. 434.) Defendant Fibreboard was, during the relevant time period, the manufacturer of "PABCO" brand roofing products which it sold to distributors such as Ford, WBSI and State.

The evidence at trial below demonstrated that Ford, which had warehouses in San Jose and San Francisco,

planned to open an additional warehouse and sales operation in Oakland in the latter part of 1963. The news of the new Ford warehouse was most distressing to two of Ford's competitors in the Oakland area—WBSI and State. Mr. Lewis (State) and Mr. Volker (WBSI) each complained directly to at least two Fibreboard representatives (Mr. Leo LaPlant and his superior, Mr. John Hoover). T. 83-98; 141-142.)[2] The Fibreboard people were advised that this new competition would not be welcomed (T. 141-142) and that State for one might take on other roofing lines if Fibreboard supplied Ford's Oakland operation with PABCO materials. (T. 98.)

Lewis also confirmed that Ford was a lower priced competitor (a "price-cutter") and identified a letter sent by State to its customers announcing lower prices in response to price competition in the Oakland area which was stimulated principally by Ford's lower prices. (Pl. Ex. 18; T. 207-210.)

It was undisputed that during the years 1961, 1962 and 1963, Fibreboard made annual sales of PABCO products to plaintiff Ford in the amounts of $90,500; $509,600; and $563,600 respectively. (R. 435.) However, in late 1963, after receiving complaints about Ford's price cutting and its new Oakland warehouse (see plaintiff's summarization of testimony at R. 854-861 and R. 871) defendant Fibreboard initially refused to make deliveries of roofing material to Ford's Oakland warehouse and eventually terminated all business dealings with Ford. (R. 436.)

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[2]"T." refers to the Reporter's Transcript of the trial and proceedings below. The numbers following "T." refer to the relevant pages of the transcript.

From the beginning of the trial through the final arguments, the singular and overriding issue for the jury was whether defendant Fibreboard's refusal to deliver and eventual termination of business with plaintiff Ford was in response to urging by, and thus pursuant to agreement with plaintiff's competitors, or whether Fibreboard unilaterally terminated its business dealings with Ford on the basis of independent business judgment. The jury's verdict in favor of plaintiff necessarily reflects a finding of concerted action between Fibreboard, WBSI and State whereby plaintiff Ford was cut-off from its source of supply because of complaints from its competitors who were unable or unwilling to meet Ford's vigorous competition including its lower prices. (See the District Court's Instructions to the jury, T. 928-947; see also, *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Radiant Burners, Inc. v. People's Gas Light and Coke Co.*, 364 U.S. 656 (1961); *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Girardi v. Gates Rubber Co.*, 325 F.2d 196 (9th Cir. 1963).

The District Court refused to grant defendant's motion for judgment notwithstanding the verdict or, alternatively, new trial on grounds relating to the weight of the evidence, the proof of damages, the propriety of the instructions or the admissibility of evidence. Indeed, as to those grounds the Court specifically and expressly denied defendant's motion. The Court below did, however, grant the motion for judgment notwithstanding the verdict on the ground that defendant's concerted and anticompetitive conduct, although otherwise violative of Section 1 of the Sherman Act, was not in restraint of interstate commerce within the meaning of that statute. (R. 1016-1027.) The Court of

Appeals for the Ninth Circuit affirmed ". . . for the same reasons and upon the same legal grounds set forth (by) the District Court".

(2) The Evidence Concerning Interstate Commerce.

At the trial the defendant took the position that the evidence concerning interstate commerce was insufficient to go to the jury. (R. 1017-1018). Defendant refused to submit proposed instructions on that issue. (R. 1124-25). The immediate question for the District Court, then, was whether plaintiff's evidence on interstate commerce was legally sufficient to present to the jury. The case (absent the interstate commerce issue) was submitted to the jury and a verdict in plaintiff's favor was returned. The subsequent grant of judgment notwithstanding the verdict on the commerce issue as affirmed by the Court of Appeals must, then, be taken as a ruling that plaintiff's evidence was insufficient to even raise a jury question as to the restraint on interstate commerce. The facts summarized immediately below indicate that the lower courts' rulings were erroneous.

It is undisputed that defendant Fibreboard manufactured PABCO roofing products at its roofing plant at 6350 Northwest Front Avenue in Portland, Oregon, as well as at several locations within California. (R. 434-435). Inasmuch as it was clear (from the undisputed facts in the joint pretrial statement) prior to trial, that some of these Oregon produced roofing materials were shipped across state lines from Oregon to the relevant market in California, plaintiff had properly assumed that no issue of interstate commerce would be raised in the case. (R. 901). This assumption was reasonable in light

of the defendant's pre-trial posture in the case. *First,* prior to trial, Fibreboard made a motion for summary judgment; nowhere in that motion for summary judgment did they assert a lack of involvement of interstate commerce. (R. 307, et seq.). *Second,* after the District Court denied that motion for summary judgment, Fibreboard filed, in accordance with Local Rule 105, a Pre-Trial Statement (R. 279, *et seq.*) which did not raise any factual or legal issues concerning interstate commerce; nor did it include the citation of any case dealing with interstate commerce. *Third,* after the respective pre-trial statements were filed a pre-trial order was signed in the case by the trial judge, and that pre-trial order does not list among the issues to be litigated any question concerning interstate commerce. (R. 433-444). *Fourth,* within a few days before the trial was to start, Fibreboard gratuitously (there being no obligation to do so) filed an extensive pretrial brief in which there was no issue framed concerning commerce and no citation of any case dealing with commerce. (R. 593, *et seq.*) Finally, Fibreboard filed a set of jury instructions which contained no instruction whatever on interstate commerce (R. 684, *et seq.*) It was only on the first day of trial that plaintiff's counsel was advised that defendant Fibreboard would, in fact, raise the lack of interstate commerce in defense. (R. 901.)

The District Court rejected plaintiff's contention that defendant had waived objection to the interstate commerce issue and that they should be estopped from now denying the existence of requisite interstate involvement. The Court did admonish defendant's counsel to cooperate with plaintiff in gathering together all relevant data con-

cerning interstate commerce. (R. 902.) Defendant, however, did not cooperate in the gathering of information requested by plaintiff. During trial, defendant failed to produce documents in response to plaintiff counsel's frequent requests for statistical information solicited concerning interstate commerce. (R. 902-905).

Notwithstanding the defendant's surprise and belated injection of the interstate commerce issue into the case and the lack of cooperation in producing the information as requested by plaintiff Ford, the District Court ruled that there was no estoppel or waiver concerning that issue. (R. 1087.) Despite this handicap imposed on plaintiff Ford, substantial evidence of involvement with interstate commerce was nevertheless presented. Moreover, at the close of plaintiff's evidence, defendant's motion for directed verdict on interstate commerce grounds was denied (T. 803-820) and defendant thereafter offered no evidence negating interstate involvement. Plaintiff's evidence concerning interstate commerce was as follows:

Mr. Leo LaPlant, the first witness to testify, was a Fibreboard sales representative in the Oakland area during the relevant period. La Plant confirmed the fact that roofing materials produced at Fibreboard's Portland, Oregon plant were delivered to California for distribution to wholesalers in the San Francisco Bay Area. The relevant portion of Mr. LaPlant's testimony was as follows (T. 80):

> "Q. Incidentally, sir, do you know whether or not any materials produced at the Oakland plant—excuse me, the Portland, Oregon plant were ever delivered down here for distribution to wholesalers?

A. Yes, there was.

Q. And what line of materials were those, sir?

A. The general line of roofing products.

Q. They were shipped from Portland to the Bay Area?

A. Yes.

Q. And they were distributed to wholesalers?

A. Yes."

In fact, Mr. LaPlant had specific recollection of such Oregon produced materials being sold to State Shingle (T. 80), one of Ford's competitors and an alleged co-conspirator in the scheme to deprive plaintiff of its source of supply.

The interstate aspect of this case was also confirmed by LaPlant's superior, Mr. John Hoover. Hoover testified that the greatest bulk of building materials sold to distributors in the San Francisco Bay Area came from the Fibreboard plant in Martinez, California; but that the second largest source of supply for the relevant market was from Fibreboard's plant in Portland, Oregon. (T. 182-183). Mr. Hoover's testimony was as follows:

"The Court: Well, do you know from what plant the building materials—what plant of yours the building materials were shipped into for the East Bay Area?

The Witness: Well, the greatest bulk of them would come out of Martinez.

The Court: All right. And what about the residue after the greatest bulk from Martinez?

The Witness: Well, that is the point. They may have been shipped from Portland. Some may have." (T. 182).

* * * * * * * * *

"Q. Well, Mr. LaPlant told us yesterday that the Portland plant shipped materials down into the Bay area. Would you dispute that?

A. No."

(T. 183).

As the District Court itself recognized, based on the evidence it heard, the supply of roofing materials from Fibreboard's Portland, Oregon, plant was particularly important during periods when there existed shortages of materials. (R. 1022). And it was during such periods of shortage that the competitive situation between Ford and its competitors became especially intense. As Mr. La Plant testified, the opening by plaintiff Ford of its Oakland warehouse would enhance the vigor of competition in the sale of PABCO products at the distributor level. (R. 83). LaPlant also conceded that PABCO supply (including, presumably, the material supplied from Oregon) was important to defendant State and any shortages in supply were met with vigorous complaints on the part of the distributor. (R. 92). Thus, the supply of materials coming into the Northern California market from Oregon had a direct bearing on the vigor of competition between Ford and its defendant competitors, particularly during critical periods of shortages in supply.

Additional evidence of interstate commerce involvement is found in the testimony of Mr. Thomas, president of Ford. Prior to its termination, plaintiff Ford purchased from defendant Fibreboard large quantities of roof insulation. This insulation was manufactured by Kaiser in Camas, Washington, or by United States Gypsum in Pilot Rock, Oregon. The material was then sold to defendant Fibreboard, which in turn would sell it to plaintiff or

other distributors in California. (T. 428-430). The relevant portion of Mr. Thomas' testimony was as follows:

"Q. Let me ask you, Mr. Thomas: Did you buy a product called "roof insulation" from PABCO during the period of time that you distributed their products at San Jose?

A. Yes, sir.

Q. And will you tell the jury what roof insulation is?

A. Roof insulation is the insulation that is put on top of the roof to properly insulate the building. To keep it cool or warm, as the case may be.

Q. Did Fibreboard make the roof insulation you bought from them?

A. No.

Q. Who made it?

A. I believe at the time it was manufactured by Kaiser or U. S. Gypsum.

Q. Gypsum?

A. United States Gypsum Company, as I recall.

Q. One or a series of those companies made this material?

A. Yes, sir, they did.

Q. And where is it made?

A. I believe their plant is in Oregon.

Q. And where is Kaiser's plant that makes this insulation?

A. Kaiser's plant is in Camas, Washington.

Q. And where is United States Gypsum's plant that makes this insulation?

A. I think their plant was in Pilot Rock, Oregon.

Q. And that material was bought by you from Fibreboard here in Martinez?

A. Yes. Fibreboard purchased the product, shipped it to Martinez, rehandled it, and shipped it out to Ford or one of their other customers.

Q. When you say "shipped" it, you mean it was shipped from the manufacturer's plant in either Washington or Oregon to the Fibreboard plant in Martinez?

A. Yes, sir."

(T. 428-430.)

Moreover, Ford bought other products and supplies from manufacturers located outside the state of California. (T. 431-434.) Thus, the termination of plaintiff had a direct impact on the flow of products from Oregon and Washington through Fibreboard to plaintiff Ford in California.

Finally, there was evidence that the termination of Ford affected shipment of roofing materials from California to one of Ford's customers in Medford, Oregon. (T. 434.) A portion of Mr. Thomas' testimony is as follows:

"Mr. Blecher: Q. Now, any of these California contractors—did you have the material delivered outside the state for a job they were working on?

A. Yes, we did.

The Court: I see. At the request of some of your customers you delivered stuff outside the state of California?

The Witness: Yes.

Mr. Blecher: Q. And Fibreboard shipped it for you outside of California?

A. Yes.

The Court: All right."

(T. 435.)

Thus, the record—without any evidence to the contrary—establishes beyond doubt that the conspiratorial termi-

nation of Ford operated directly on the movement of goods purchased and sold by plaintiff in the flow of interstate commerce.

REASONS FOR GRANTING THE WRIT

This petition presents a question of extreme importance concerning the coverage and operation of the federal antitrust laws. Both courts below have ruled that Congress, under the Sherman Act, does not have the authority to reach and regulate a conspiracy between a supplier and dealers of roofing material which was directed toward the cancellation of a lower priced competitor of the conspiring dealers. The courts below ruled that there was not sufficient impact on interstate commerce in our present case to come within the jurisdiction of the Sherman Act even though:

(1) Defendant Fibreboard operated plants and manufactured roofing materials in California and Oregon and shipped materials from its Oregon plant into the relevant California market during periods of shortages when competition between Ford and its competitors was most intense;

(2) Defendant Fibreboard directly sold roof insulation materials to plaintiff Ford, which materials were transported by Fibreboard from Oregon and Washington to Ford's warehouse in California; and

(3) Defendant Fibreboard sold roofing materials to Ford which were delivered by Fibreboard from California to a Ford customer in Oregon.

Petitioner submits that the rulings by the District Court and Court of Appeals below unduly restrict the regulatory reach of the federal antitrust laws contrary to principles established in prior decisions by this court. Further, the rulings below are inconsistent with decisions by other Courts of Appeal throughout the nation thereby creating a conflict among the circuits and confusion as to the nature of impact on interstate commerce necessary to sustain federal jurisdiction under the Sherman Act.

I. THE RULINGS BELOW UNDERMINE THIS COURT'S DECISIONS CONCERNING THE AUTHORITY OF CONGRESS TO REGULATE INTERSTATE COMMERCE AND TO PROHIBIT ANTICOMPETITIVE CONDUCT WHICH RESTRAINS INTERSTATE TRADE AND COMMERCE.

It is fundamental that the Sherman Act, by its terms, is directed at "every contract, combination . . . or conspiracy in restraint of trade or commerce among the several states . . ." (15 U.S.C. §1) and every attempt, or combination or conspiracy to monopolize any part of the trade or commerce among the several states. (15 U.S.C. §2.) The broad language of the statute has been given full and expansive effect by the Supreme Court with the observation that in enacting the Sherman Act, Congress, "left no area of its constitutional power unoccupied; it exercised all of the power it possessed." *United States v. Frankfort Distilleries*, 324 U.S. 293, 298 (1945). The Sherman Act embraces all restraints including those occurring before the interstate journey begins, *Mandeville Island Farm, Inc., et al. v. American Crystal Sugar Co.*, 334 U.S. 219, 233 (1948) during the course of the interstate journey, *Federal Trade Commission v. Stand-*

ard Oil Co., 340 U.S. 231 (1951); or at the end of the interstate journey, *United States v. Chrysler Corporation*, 180 F.2d 557, 559 (9th Cir. 1959).

The significance of the above-cited cases can only be understood in the context of a general analysis of the reach of congressional authority under the commerce clause. In its most recent analysis of this reach of federal jurisdiction the Supreme Court, in *Perez v. United States*, 402 U.S. 146, 150 (1971) stated:

> "The Commerce Clause reaches, in the main three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused . . . Second, protection of the instrumentalities of interstate commerce . . . Third, those activities affecting commerce."

In *Perez*, the issue for the Court was whether interstate commerce was sufficiently involved in a single extortionate credit transaction which occurred wholly within the State of New York. This Court ruled that—in the federal law against "loansharking" Congress attempted to use the full extent of its commerce power. As such, if the class of activity involved substantially affects interstate commerce then Congress can regulate the entire class and also reach individual incidents within the class even though that individual incident does not in and of itself affect interstate commerce. (402 U.S. at pp. 153-154.)

In re-affirming this "class of activities" test, the Court approvingly cited such cases as *Wickard v. Filburn*, 317 U.S. 111 (1943) a ruling that the wheat grown by one farmer wholly for home consumption purposes

> ". . . was constitutionally within the scope of federal regulation because, though never marketed interstate, it supplied the need of the grower which otherwise would have been satisfied by purchase in the open market." (402 U.S. at p. 151.)

As this Court has recently recognized, where the class of activities is within the reach of federal regulation, ". . . the courts have no power to excise, as trivial, individual instances of the class. *Maryland v. Wirtz*, 392 U.S. 183, 193 . . ." *Perez v. United States*, 402 U.S. at p. 154 (1971).

The standards and considerations articulated in cases such as *Wickard, Wirtz* and *Perez* are unquestionably applicable to the appraisal of interstate commerce in antitrust cases. *Mandeville Island Farm, Inc. v. American Crystal Sugar Co., supra; Burke v. Ford*, 389 U.S. 320 (1967). Indeed, in *Mandeville Island*, an antitrust case, the Supreme Court specifically cited *Wickard v. Filburn*, as controlling on the interstate commerce issue. See also: *Gulf Oil Corp. v. Copp Paving Co., Inc., cert. granted*, ... U.S. ....., 94 S.Ct. 1586 (1974) (Opinion below 487 F.2d 202), where this Court granted review as to the issue of interstate commerce under the Robinson-Patman Act and Sections 3 and 7 of the Clayton Act. This Court, however, left standing the ruling of the Ninth Circuit Court of Appeals that there was sufficient impact on interstate commerce to satisfy the jurisdictional requirements of the Sherman Act. In the *Gulf Oil* case this Court will give guidance to lower Federal Courts concerning the question of interstate commerce under the Robinson-Patman Act and Sections 3 and 7 of the Clay-

ton Act. Petitioner Ford respectfully submits that certiorari should be granted in the present case so that a definitive decision can be made giving similar guidance to lower courts with respect to the interstate commerce requirement under the Sherman Act. Such review is especially essential in light of the extremely narrow view of interstate commerce adopted by the courts below in their rulings on this case.

In this context the rulings below are indeed revolutionary, for they mean that Congress does not have the constitutional power—under the commerce clause—to prohibit anticompetitive conduct such as that perpetrated by defendant, Fibreboard in our present case.

Under its constitutional power then, Congress can prohibit a single farmer from growing wheat for home consumption (*Wickard v. Filburn, supra*), it can criminally punish a single act of "loansharking" occurring wholly within one state (*Perez v. United States, supra*), it can prohibit a single act of transporting a woman across a state line for immoral purposes (even though such was not in connection with a commercial prostitution syndicate) (*Cleveland v. United States*, 329 U.S. 14 (1946)), it can prohibit a single incident of racial discrimination where one customer is refused a hotel room or a meal because of his race (*Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964)), and it can criminally punish a price fixing agreement with respect to a single dishwashing machine (*United States v. Bensinger Co.*, 430 F.2d 584 (8th Cir. 1970).) Yet, under the rulings of the courts below, Congress cannot prohibit and the reach of federal

authority may not constitutionally extend to a conspiratorial agreement whereby competitors and a supplier agree and arrange to cut off a source of supply to the plaintiff, even though the defendant—Fibreboard—the manufacturer of the product has plants in two states and supplies the relevant Northern California market, in part, from its Oregon plant, and even though some of the products formerly sold by Fibreboard to plaintiff Ford and its competitors in California originated from Oregon and Washington, and even though some of the past sales of products from defendant Fibreboard to plaintiff Ford involved delivery from Fibreboard in California to Ford's customer located in Oregon.

It is submitted that the lower courts' analysis of Congress' constitutional power under the commerce clause and its restriction on the reach of the Sherman Act cannot stand up under the rulings of this Court. See, for example, *Burke v. Ford*, *supra*. Petitioner knows of no decision in the past thirty years in which this Court has held Congress' constitutional power under the commerce clause insufficient to reach an object of regulation. The Courts' ruling below, therefore, does what this Court has consistently refused to do—to restrict and limit the basic and plenary constitutional authority of Congress to regulate interstate commerce and adverse impacts on competition in the marketplace. The decisions below reverse trends and policies, articulated by this Court recognizing that Sherman Act remedies extend both to (1) restraints upon transactions in the flow or stream of interstate commerce and (2) restraints which substantially *affect* or place a burden upon interstate commerce. *Burke*

v. Ford, 389 U.S. 320 (1967); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948); *Las Vegas Merchant Plumbers Ass'n. v. United States*, 210 F.2d 732, 739 (9th Cir. 1954), *cert. denied*, 348 U.S. 817. Both theories are relevant in establishing the existence of a restraint on interstate commerce in our present case, and each will be discussed in turn.

(A) Defendants' Wrongful Termination of Plaintiff Ford Directly Restrained the Flow of Goods in Interstate Commerce.

The discussion of the evidence in the Statement of Facts, *supra*, is undisputed concerning the movement of roofing materials from defendant Fibreboard's plant in Portland, Oregon, to California distributors such as plaintiff Ford and its competitors in the Oakland, California, area. (T. 80.) It is also clear that roofing materials manufactured by United States Gypsum in Pilot Rock, Oregon, and by Kaiser in Camas, Washington, were purchased by defendant Fibreboard and transported by Fibreboard to California for sale and delivery to plaintiff Ford. (T. 428-430.)

Moreover, there was evidence in the record of Fibreboard selling roofing products to Ford for customers of plaintiff located in Oregon. Fibreboard would itself directly ship these materials from its California plant to Ford's customer in Oregon. (T. 434-435.)

Thus there is no doubt that roofing materials sold by defendant to plaintiff were in the interstate stream or "flow" of commerce. Moreover, in its decision below the

District Court properly stated the applicable legal standard:

> "It is true that, if a restraint occurs within the 'flow' of interstate commerce, substantial effect on interstate commerce then follows as a matter of law and *there is no need to show that any particular amount of interstate commerce was affected* by the restraint." (R. 1021; emphasis added.)

Both courts below, however, chose to disregard the clear evidence of direct interstate flow of materials and erroneously determined that the evidence was not sufficient to establish an interruption in the "flow" of interstate commerce as a result of defendant's violation of Section 1. The Court based this incorrect conclusion on factual premises relating to (1) the interstate movement of insulation materials and (2) Fibreboard's Oregon produced materials sold in the relevant California market. (R. 1022.)

First, the District Court stated (R. 1022) that the insulation material bought by defendant Fibreboard from Kaiser and others (in Oregon and Washington) and transported by Fibreboard to California for sale to plaintiff Ford and its competitors was not a "PABCO" product and hence not covered in the termination notice. Moreover, the court below found that there was no evidence that this insulation material was transported from out-of-state to the marketing plant in California *on a regular basis.* And, finally, the court determined that—after the termination—Ford was able to buy these same insulation materials from suppliers and dealers other than Fibreboard. (R. 1022.)

These factual determinations—even if correct[3]—do not support the District Court's ruling against plaintiff Ford on the interstate commerce issue. The court below was forced to recognize certain facts which are beyond dispute. Prior to the wrongful termination of Ford, plaintiff Ford purchased insulation material from defendant Fibreboard which material was transported by defendant from Oregon and Washington to the relevant California market. After the termination, Ford was not able to purchase these interstate materials from Fibreboard. As the District Court itself conceded, Ford found it necessary to obtain this material from the manufacturer or from other dealers. (R. 1022). The point is, however, that the wrongful termination directly operated to prevent plaintiff Ford from obtaining interstate products from the defendant Fibreboard. The fact that, after the termination, plaintiff was able to purchase materials from another source does not remove the involvement of interstate commerce from the prior relationship between plaintiff Ford and defendant Fibreboard. The wrongful termination of Ford by Fibreboard directly restrained the flow of insulation materials in interstate trade between the two parties. That con-

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[3]A fair reading of the record indicates that the court below appraised the evidence on interstate commerce in the light most favorable to the defendant. Inasmuch as the issue was submitted to the court on the basis of defendant Fibreboard's contention that the evidence was legally insufficient to go to the jury (R. 1124-1125) and considering the verdict in favor of plaintiff Ford on all other aspects of the case, the District Court obviously applied the wrong standard in assessing the record. The evidence must be viewed in the light most favorable to plaintiff. Moreover, the jury's verdict in favor of plaintiff must be reinstated if there is any substantial evidence supporting the presence of involvement of interstate commerce with respect to defendants' anticompetitive conduct. *Las Vegas Plumbers Ass'n. v. United States, supra,* 210 F.2d at p. 742.

sideration—standing alone—is sufficient to satisfy federal jurisdictional and constitutional requirements and to bring the Sherman Act remedies into play.

Once it is established that the defendants' termination of plaintiff operated directly on goods which, prior to the termination, "flowed" from defendant Fibreboard to plaintiff Ford "in interstate commerce", the small quantity of the materials involved, the irregularity of the flow and the possible alternative sources of supply are insufficient bases to displace federal jurisdiction and Sherman Act coverage. It was recognized in the *Las Vegas Merchant Plumbers Ass'n.* case, *supra*, 210 F.2d at p. 748: "the test of impact on commerce is qualitative, not quantitative . . . Section 1 of the Act brands as illegal the character of the restraint not the amount of commerce affected". (Citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225.)

In another context, federal reach under the Commerce Clause has been held sufficient to prevent practices of racial discrimination by restaurants which purchase food supply in interstate commerce, even though there is no showing—in a specific case—that the act of discrimination reduced the flow of food in interstate commerce. *Katzenbach v. McClung, supra.* Thus, a restaurant owner's argument that his Negro customer could purchase the "interstate" food he desires from other sources of supply (i.e., other restaurants or grocery stores) does not defeat federal jurisdiction. And the same rule applies to defendant Fibreboard which wrongfully refused to sell interstate materials to Ford, notwithstanding alternative sources of supply.

The second set of factual premises relied upon by the courts below concerns defendant Fibreboard's production of roofing materials in Portland, Oregon, for transportation and sale in the relevant California market. Again, the courts rejected this obvious "flow" of goods in interstate commerce as a basis for satisfying the federal jurisdictional requirement. The District Court stated that there was no evidence as to the amount or regularity of these interstate deliveries to and sales in the relevant California market. (R. 1022.) Moreover, the court ruled that there was no evidence that these interstate materials were sold to plaintiff. (R. 1022.) This latter observation is most remarkable in light of the undisputed evidence that the Portland, Oregon, plant was defendant Fibreboard's second most important operation (next to its Martinez plant) for purposes of supplying dealers in the Northern California area. (T. 182-183.) Mr. LaPlant, a Fibreboard official candidly admitted specific recollection of Oregon produced roofing materials being sold to defendant State Shingle, a competitor of plaintiff Ford. (T. 80.) Not surprisingly, Mr. LaPlant had no specific recollection as to whether or not Oregon-produced materials were sold to plaintiff. (T. 80-83.) However, in light of defendant's concessions that the Oregon plant was Fibreboard's second most important supply source for Northern California customers and the specific recollection of sales to the State Shingle, the jury could properly and reasonably have found that prior to the termination, Fibreboard also sold Oregon-produced materials to plaintiff Ford.

The importance of the Oregon-produced materials on competitive conditions in the Northern California market is emphasized by the District Court's specific recognition that Oregon materials were used to meet California demand when there were temporary shortages of materials at the Martinez plant. (R. 1022.) It was during these supply shortages that plaintiff Ford's competitors vigorously complained to Fibreboard. (T. 92.) The jury, then, could have found that the supply of roofing materials from Fibreboard's Portland, Oregon, plant exerted an extremely substantial and important impact on competition between plaintiff Ford and the very competitors which acted in concert with defendant Fibreboard in forcing the termination of Ford.

Thus, not only did defendant's conduct directly restrain the interstate flow of roofing materials between Fibreboard and Ford, it also operated directly on materials, the flow of which in interstate commerce, had a crucial impact on competition between Ford and its competitors. Moreover, the termination of plaintiff Ford was directly related to its opening of a warehouse in Oakland which would—according to Mr. LaPlant of Fibreboard—enhance the vigor of competition in the relevant market (R. 83); this, of course, would include competition *vis a vis* the Oregon-produced material.

The two sets of factual premises relied upon by the District Court and accepted by the Court of Appeals (as discussed above) fail completely to take into account a third line of evidence offered by plaintiff which, standing alone, demonstrates that defendant's wrongful termina-

tion of Ford directly interfered with the flow of roofing materials in interstate commerce. Prior to Fibreboard's wrongful termination of Ford, Ford purchased roofing materials which Fibreboard delivered directly to plaintiff's customer in Oregon. (T. 434-435.) Obviously, after Fibreboard terminated Ford's source of supply, interstate sales and shipments by Fibreboard to Ford's Oregon customer ceased. This again demonstrates a direct impact on the interstate "flow" of roofing materials as a result of the wrongful termination.

Notwithstanding the above undisputed evidence of defendant Fibreboard's direct interstate shipments and sales to plaintiff Ford, its customers, and its competitors, the District Court ruled that:

> (1) "There is no substantial evidence of any significant interference with any roofing materials which could be fairly said to have been 'in the flow' of interstate commerce." (R. 1024) and;
>
> (2) "Even assuming that there was a *per se* violation in this case and further assuming[4] that the Oregon and Washington items were such that ordinarily they could be held to have remained within the flow of interstate commerce, the evidence in this particular case is so meager as to be insufficient to support any finding other than that these items were ". . . so 'miniscule' as to make it readily apparent that any combination here involved was directed, not at interstate activity, but at intrastate activity." (Citing the "de minimis" ruling of the Ninth Circuit

[4]These so-called "assumptions" are compelled by the state of the record inasmuch as the jury could well have found such "assumptions" to be facts.

case, *Yellow Cab Co. of Nevada v. Cab Employees, Local #881,* 457 F.2d 1032 (9th Cir. 1972).) (R. 1025.)

The District Court thus contradicted itself. The Court first recognized that some roofing materials moved directly from Fibreboard in interstate commerce to Ford, its customers and competitors and that under the "in flow" theory of jurisdiction ". . . the test is qualitative, rather than quantitative, and there need be no showing of a substantial affect of the restraint upon interstate commerce." (R. 1020.) The court then ruled that plaintiff Ford did not demonstrate enough of an impact on interstate commerce. The rulings below, therefore, undermine the effectiveness and reach of the Sherman Act in establishing free and open competition as the economic policy of the nation.

As this Court stated, in *United States v. Socony Vacuum Oil Co.,* 310 U.S. 150 at p. 225 (Note 9): "The amount of interstate or foreign trade involved is not material, since Section 1 of the Act brands as illegal the character of the restraint not the amount of commerce affected." To the same effect, see *United States v. McKesson & Robbins, Inc.,* 351 U.S. 305, and *Safeway Stores, Inc. v. Federal Trade Commission,* 366 F.2d 795 (9th Cir. 1966).

Or, as stated more directly by Mr. Justice Jackson in *United States v. Women's Sportswear Mfr. Assn.,* 336 U.S. 460, 464 (1949):

> "Restraints, to be effective, do not have to be applied all along the line of movement of interstate commerce. The source of the restraint may be intra-

> state, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."

While the agreement to terminate Ford was a wholly local transaction, the very nature of the agreement was to preclude Ford from buying Fibreboard products—including those which defendant brought to the Bay Area from Washington and Oregon in interstate commerce, and those which were sold from California to Ford's customer in Oregon.

In *Binderup v. Pathe Exchange*, 263 U.S. 291 (1923), as in our case, the wrongful termination of the plaintiff operated to disrupt the interstate flow of goods between defendant and plaintiff. In our case, as in *Binderup*, it is difficult to imagine a more direct restraint of interstate commerce. The termination of plaintiff directly prevented it from purchasing from Fibreboard and from reselling (in and out of California) products made in Washington and Oregon. Thus Ford's termination as a distributor directly restrained the flow of goods in interstate commerce.

The list of cases applying the direct restraint or "in flow" commerce test to even a single retailer include, among others, *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Radiant Burners, Inc. v. People's Gas Light and Coke Co.*, 364 U.S. 656 (1961); *Bragen v. Hudson County News Co.*, 168 F.Supp. 231 (N.J. 1958)

reversed on other grounds, 321 F.2d 832 (4th Cir., 1960) and a District Court decision in *Bailey's Bakery, Ltd. v. Continental Baking Co.*, 235 F.Supp. 705 (Hawaii 1964).

To uphold the rulings below, this Court would have to reject an interminable line of decisions holding that the commerce requirement is satisfied when a basically local seller is deprived of goods which originated outside of the state in which he transacts most of his business. As the Court has observed, interstate commerce comprehends ". . . trade in any and all its forms including the transportation, purchase, sale and exchange of commodities". *Welton v. Missouri*, 91 U.S. 275, 280; *United States v. South-Eastern Underwriters Ass'n., supra*, 322 U.S. 533, at p. 551 (n. 34).

(B) The Quantity of Out of State Roofing Materials Involved in This Case Was Sufficient to Satisfy Sherman Act Jurisdictional Requirements.

It has already been established herein that where there is a *per se* violation of the Sherman Act which affects goods in the flow of interstate commerce, the quantity of the goods involved is immaterial. On that point alone, the rulings of the District Court and Court of Appeals below should be reversed. Plaintiff Ford demonstrated at trial that prior to termination it purchased Oregon and Washington-produced roofing materials from Fibreboard and also that Fibreboard had shipped California materials to Ford's customer in Oregon.

Moreover, Ford's termination stemmed from its announced plan to open an Oakland facility (a move which enhanced the vigor of competition in the area), thus the

competitive impact of the termination cannot be denied. Moreover, the roofing materials manufactured by Fibreboard in Oregon and sold and delivered in the Northern California market were of particular importance during periods of shortages. It was at this time that the competition between Ford and other distributors grew so intense. Therefore, it is clear that Fibreboard's termination of Ford and the resultant foreclosure of the Oregon supply bore directly on the vigor of competition in the relevant Northern California market.

In other words, it cannot be denied that the Fibreboard products supplied from Oregon (during periods of shortages in materials) had a direct bearing on the vigor of competition in the Northern California market. This Court considered a similar situation in *Simpson v. Union Oil Co.*, 377 U.S. 1, 16 (1963) where a single gasoline station dealer successfully complained of price-fixing. In upholding Sherman Act jurisdiction the Supreme Court recognized that ". . . there is actionable wrong *whenever the restraint of trade or monopolistic practice has an impact on the market;* and it matters not that the complainant may be only one merchant." (377 U.S. at p. 16; emphasis added). This same view was adopted by the Fifth Circuit in *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26 (5th Cir. 1972).

Thus, in our present case, the competitively important interstate supply of materials flowing from defendant Fibreboard to plaintiff Ford, its customers and its competitors—regardless of the relatively small quantity or irregularity of shipments—cannot be considered insignificant, "minuscule" or "*de minimis*" in its impact on

the roofing dealers (such as plaintiff Ford and its competitors) in the relevant market. Fibreboard's Oregon-produced roofing material was important to the dealers in the Northern California market during shortages—that is when competition was most vigorous. The interstate supply was, therefore, clearly significant to competitive conditions in the relevant market. And Fibreboard's wrongful termination of Ford was a restraint of trade which had an impact on the market.

The Supreme Court in a recent unanimous decision has recognized that when competition is reduced, prices increase and unit sales decrease. It can therefore be assumed that fewer purchases from interstate suppliers will result. The reduction of competition thus "inevitably" affects interstate commerce. *Burke v. Ford, supra,* 389 U.S. at p. 322.

In our case, when Fibreboard terminated dealings with Ford it had one less customer to supply. This reduced the demand on Fibreboard and made shortages of materials less likely (or, at least, less frequent); hence, there would necessarily be less need to supply the California market from the Oregon plant, an inevitable reduction in Fibreboard's interstate sales and delivery.

The District Court, in characterizing the interstate activity as "de minimis" (R. 1026) (citing *Yellow Cab Co. of Nevada v. Cab Employers, Local No. 881, supra*) erred in yet another respect. Under the "class of activities" test used by the Supreme Court to assess impact on interstate comerce, it is not proper to focus solely on the interstate effect of the parties before the Court. Instead, the activities of the particular plaintiff and de-

fendant in a given case must be viewed as one example of a more general class of activity. The "interstate" element is satisfied if the overall class of conduct—taken cumulatively—has an impact on commerce among the states. For example, it would be impossible to show that race discrimination against one interstate traveler has anything other than a "minuscule" or "de minimis" effect on interstate commerce. The same is true of the transportation of one item of stolen goods or of the failure to pay a minimum wage to one maintenance employee, or of the growing of wheat for home consumption, or of one single "loanshark" transaction. No one of the above acts—standing alone—has a substantial impact on interstate commerce. Yet each and every case set forth as examples (and hundreds of similar ones) have been recognized as being within the reach of congressional regulation under the commerce clause. *Heart of Atlanta Motel v. United States, supra; Maryland v. Wirtz, supra; Kirschbaum v. Walling,* 316 U.S. 517 (1942); *Wickard v. Filburn, supra; Perez v. United States, supra.*

The relevant test, then, is—can Congress reach the general category of conduct involved? If so, the pertinent congressional regulation will apply to the specific instance before the Court.

To apply this principle to our case is enlightening. Congress, through the Sherman Act, has prohibited all concerted refusals to deal. See *Klor's Inc. v. Broadway-Hale, supra; United States v. General Motors Corp., supra.* Thus, Congress has made a judgment that such concerted terminations as a class of activity creates a substantial burden on the free flow of goods in interstate

commerce. The correctness of this Congressional determination is too obvious to be denied. Under the commerce power, all concerted refusals may then be prohibited by federal law if Congress chooses to utilize the full extent of its constitutional authority over interstate commerce (as it has with respect to the Sherman Act). Once it is recognized that Congress may prohibit *all* concerted refusals, because all such refusals cumulatively generate a substantial and adverse impact on interstate commerce, then the federal prohibition may be applied to any single instance (such as our present case) of the general class of activity involved. There need be no showing that the single incident, standing alone, had a substantial effect on commerce. *Wickard v. Filburn, supra; Perez v. United States, supra.*

The District Court's use of the "de minimis" standard and its reliance on the *Yellow Cab* case were therefore erroneous because once it is recognized that the general class of conduct (i.e., concerted refusals to deal) cumulatively has a substantial impact on interstate commerce, ". . . the courts have no power to excise, as trivial, individual instances of the class". *Maryland v. Wirtz,* 392 U.S. at p. 193; *Perez v. United States,* 402 U.S. at p. 154.

II. BY ITS RULING BELOW, THE NINTH CIRCUIT COURT OF APPEALS HAS CONTINUED TO FOLLOW A VIEW OF IMPACT ON INTERSTATE COMMERCE WHICH CONFLICTS WITH RULINGS BY COURTS IN OTHER CIRCUITS.

The rulings below follow, cite, and rely upon other Ninth Circuit decisions—such as *Page v. Work,* 390 F.2d 323 (9th Cir. 1961) and *Yellow Cab Co. of Nevada v.*

Cab Employees Local No. 881, 457 F.2d 1032 (9th Cir. 1972)—which narrowly and, we submit, erroneously, construe the concept of interstate commerce. As such the *Ford* case adds yet another Ninth Circuit precedent restricting the regulatory reach of the Sherman Act.[5] Numerous recent decisions by Courts in other Circuits make it clear that these Ninth Circuit rulings are out of line with the mainstream of judicial construction of Sherman Act jurisdiction.

Recently, the Fifth Circuit Court of Appeals, in *Lehrman v. Gulf Oil Corp., supra*, found the interstate commerce element satisfied as to an anticompetitive practice aimed at a service station dealer who sold gasoline which had been produced in the same state. Our present case is peculiarly akin to *Lehrman*. That case was brought by a terminated Gulf Oil dealer who failed to comply with Gulf's "suggested" prices. In affirming the plaintiff's entitlement to treble damages (though reversing for a new trial only on the issue of damages) the Fifth Circuit rejected Gulf's argument that the requisite connection between the restraint and interstate commerce had not been established. There, not unlike here, the evidence on commerce consisted of the uncontradicted testimony of the defendant's manager to the effect that many Gulf products sold by the plaintiff at retail originated in the State of Texas.

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[5]Prior to the *Ford* ruling, the Ninth Circuit Court of Appeals seemed to be following the prevailing view of liberally construing the interstate commerce requirement under the Sherman Act. See *Rasmussen v. American Dairy Ass'n.*, 472 F.2d 517 (9th Cir. 1973); *Copp Paving Co., Inc. v. Gulf Oil Corp.*, 487 F.2d 202 (9th Cir. 1973); *Rosen v. Rossmoor Corp.*, ... F.2d ..... (9th Cir. No. 26,475, Oct. 17, 1973). But the present ruling in *Ford* reaffirming *Page v. Work, supra*, and the *Yellow Cab Co. of Nevada* case, *supra*, puts the Ninth Circuit back on an erroneous and inconsistent path *vis a vis* the other Circuits.

In rejecting Gulf's reliance on the Ninth Circuit *Page v. Work* decision, the Court said:

> "The rationale is inapplicable to Lehrman. Gulf's actions killed off Lehrman's business permanently. There has been a reduction in Gulf's interstate purchase of tires, batteries and accessories because, even if the absolute level of such purchases remained constant after Lehrman went out of business, interstate TBA purchases would have reached above the constant had Lehrman continued in operation. There is no indication that Gulf's interstate purchases of TBA items are oblivious to fluctuations in the number of its operating retailers in these times of sophisticated, data-sensitive corporate management.
>
> We do not accept the suggestion that *Page v. Work* holds, as a matter of law, that a conspiracy to restrain trade in an intrastate product cannot, as a matter of law, affect trade in another, interstate product sufficiently to trigger Sherman Act jurisdiction. *The focus of the act is to protect interstate trade from interference of all degrees of subtlety. The concept of interstate commerce is a practical one. The interstate nerves of a local business can be deadened swiftly by a conspiracy the object of which happens to be the intrastate aspect of a plaintiff's business.* We see no reason why the federal courts should confine themselves to protecting against interferences with interstate commerce which, quite fortuitously, turn out to have motivated the actions of a defendant. It is the effect on commerce that determines federal jurisdiction under the Sherman Act and not any notion of the 'interstate culpability' of those who engage in anticompetitive practices. *No matter how intrastate the objects of anticompetitive conspirators, they must take their victims' involve-*

ment in intrastate commerce as they find them." (464 F.2d at p. 36. Emphasis added.)

Even though the principal impact of Fibreboard's illegal combination was on plaintiff Ford's intrastate operation, the termination did in fact cut off plaintiff's then current source of supply of certain roofing materials from Oregon and Washington. The "interstate nerves" of Ford's business operation were "deadened" by defendant's illegality. While it is true that in *Lehrman* the plaintiff was driven completely out of business, plaintiff Ford in our case managed to survive and to continue in business. Nonetheless, here as in *Lehrman,* there is in the record below uncontradicted evidence presented that as a result of defendants' wrongful termination of plaintiff Ford:

1. Fibreboard's total sales to Bay Area distributors declined;

2. Fibreboard's sales to Bay Area distributors included, as a secondary source of supply, material shipped into California from Oregon;

3. Fibreboard purchased less roofing insulation from Kaiser and Simpson from their plants outside of California because plaintiff was no longer a purchaser of these materials *from defendant;*

4. Plaintiff could no longer supply out-of-state customers with Fibreboard products manufactured in California.

In short, there was a reduction *in Fibreboard's interstate activities*—which is not affected by the fact that plaintiff remained in business and continued to purchase

materials from other suppliers. Thus, just as in *Lehrman,* "The requisite effect on interstate commerce would still result from a *reduced or altered* flow of goods into the State of . . ." California. Just as in *Lehrman,* "there is no indication that (Fibreboard's) interstate purchases of (insulation or other roofing materials) are oblivious to fluctuations in the number of its operating (wholesalers) in these times of sophisticated, data-sensitive corporate management." (464 F.2d at p. 36.)

Thus, the Ninth Circuit ruling below conflicts with the Fifth Circuit Decision in *Lehrman.* See also: *Cook v. Ralston Purina Co.,* 1974 CCH Trade Cases ¶74,943 (M.D. Ga. 1974) where the interstate commerce requirement was found to be satisfied in a case, where similar to our case, defendant produced most of its product in Georgia and made local sales to plaintiff, a Georgia customer. The Court noted, however, (as in our case) that defendant was an interstate operator and some of the products passing through defendant's warehouse and into the relevant market were produced in other states. Contrary to the result in our case, the *Cook* court specifically refused to apply the "de minimis" rule stating that any restraint on the flow of interstate commerce adversely affects interstate trade as a matter of law in violation of the Sherman Act.

The Ninth Circuit ruling below also conflicts with the Eighth Circuit decision in *United States v. Bensinger Co.,* 430 F.2d 584, 589 (8th Cir. 1970):

> "The subject of the conspiracy was only one dishwashing machine, and the price at which this $10,000 machine was fixed was only $107 above the dealers'

> cost. Nevertheless, this Court is not willing to say that large price-fixing conspiracies in interstate commerce are violations of the Act, while little ones are not; *the law condemns them all*". (Emphasis added.)

And further:

> "the fact that the conspiracy was a failure and did not bear fruit does not preclude jurisdiction to punish the conspiracy."

III. BECAUSE OF THEIR FAILURE TO RAISE THE INTERSTATE COMMERCE ISSUE PRIOR TO TRIAL AND THEIR FAILURE TO COOPERATE THEREAFTER IN THE DISCOVERY OF FACTS RELEVANT TO THAT ISSUE, DEFENDANTS SHOULD BE PRECLUDED FROM DENYING THAT THEIR ANTICOMPETITIVE CONDUCT HAD A SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE.

The rulings below also present important questions as to compliance with Rule 16 of the Federal Rules of Civil Procedure and the problems involved when "surprise" issues are injected into the trial of a federal case. The "interstate commerce" issue was not even properly before the District Court. Defendant Fibreboard failed to raise the issue in its motion for summary judgment, or its pretrial statement, or its trial brief. Nor was the issue mentioned in the pre-trial order. Under F. R. Civ. P., Rule 16 defendant should have been precluded in the interest of justice from raising this "surprise" issue at trial. *Walker v. West Coast Fast Freight, Inc.*, 233 F.2d 939 (9th Cir. 1956). Defendant's belated raising of this issue prejudiced plaintiff's ability to discover and present evidence of the impact on interstate commerce as a result of defendant's wrong.

At the very least, this Court should reverse the grant of judgment notwithstanding the verdict and remand the case for a full and fair trial on the sole issue of the effect of defendant's conduct on interstate commerce.

CONCLUSION

For the reasons stated above, Petitioner Ford respectfully requests that the Court grant this petition for writ of certiorari.

Dated, June 21, 1974.

Respectfully submitted,

LAW OFFICES OF JOSEPH L. ALIOTO,
JOSEPH L. ALIOTO,
JOSEPH M. ALIOTO,
PETER J. DONNICI,
BLECHER, COLLINS & HOECKER,
MAXWELL M. BLECHER,
HAROLD COLLINS,
Counsel for Petitioner.

HANSEN & DOLLE,
VICTOR R. HANSEN,
Of Counsel.

(Appendices Follow)

Appendix A

United States District Court
N. D. California

No. 45977

Ford Wholesale Company Inc. of San Jose, a corporation,
Plaintiff,
vs.
Fibreboard Paper Products Corporation, et al.,
Defendants.

[May 15, 1972]

MEMORANDUM OF DECISION ON DEFENDANTS' MOTION FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT INSOFAR AS SAID MOTIONS INVOLVE THE ISSUE OF INTERSTATE COMMERCE

SWEIGERT, District Judge:

Plaintiff contends (Brief of 12/13/71, pp. 32-33) that, since defendant failed to note interstate commerce in its pretrial statement as one of the issues in dispute, defendant is estopped to dispute plaintiff's allegation of interstate commerce.

Both parties filed pretrial statements herein, plaintiff on February 18, 1970 and defendant on April 6, 1970 and thereafter presented a proposed pretrial order based on

their pretrial statements, approved by both parties as to form and approved by the court on November 4, 1970.

Neither plaintiff nor defendants adequately complied with Local Rule 105(a) (3), (4) which requires a plain, concise statement of undisputed facts and of each issue of fact which a party claims or concedes to be in dispute. Neither plaintiff nor defendants clearly indicated either in their respective pretrial statements or in the approved pretrial order whether interstate commerce was or was not a disputed issue in the case. (See Pre-Trial Order Par. 3(a) (h), "Undisputed Facts," Par. 4(A-B) "Disputed Facts" and Par. (11) "Stipulations").

Certainly, there is nothing in the record to justify plaintiff's contention that any deficiency of evidence to support his interstate commerce allegation is due to plaintiff having been misled concerning the existence of the issue. There is no more reason to hold defendants estopped from raising the issue than there is reason to hold plaintiff estopped from avoiding the issue.

During a session with the trial judge concerning jury instructions, defendants' counsel took the position that the commerce question presented a straight law question for the court as to whether plaintiff had offered evidence sufficient to justify a jury finding that interstate commerce was involved. Defendant, who had submitted no instructions on the subject contended that no sufficient evidence had been offered and that there was, therefore, no commerce issue for the jury and that the issue should be withdrawn from the jury and ruled upon by the court.

Thereupon, counsel for plaintiff, although contending that there was sufficient evidence of interstate commerce,

joined in defendants' suggestion that the interstate commerce issue be left for ruling by the court and withdrew its instructions on the subject of interstate commerce.

We proceed, therefore, upon what we regard as, in effect, a stipulation of the parties that the court, not the jury, should make the ruling upon the interstate commerce issue in this case.

Clearly, plaintiff concedes his understanding that the court was to decide the issue whether there was sufficient evidence to justify a jury finding that interstate commerce was involved. (Pltf's Brief, 12/13/71 p. 25).

PLAINTIFF'S THEORY RE INTERSTATE COMMERCE

Plaintiff Ford was engaged in the business of distributing roofing products only in the California Counties of Santa Clara, Alameda, San Francisco, Contra Costa, Monterey and San Mateo. (Pretrial Order of December 7, 1970).

Defendant Fibreboard manufactured Pabco roofing products at the California cities of Martinez, Redwood City, Emeryville, Wilmington. It also had a plant in Portland, Oregon. (Pretrial Order of December 7, 1970). (Undisputed facts).

During the years from about 1961 until October 29, 1963, when Fibreboard terminated Ford (as of 12/31/63) as one of its distributors, Ford had regularly purchased from Fibreboard, under a merchandising policy statement (Pltf's Ex. 2), certain Pabco Asphalt Roofing Products at Fibreboard's Martinez, Contra Costa County plant, where the products were manufactured. Ford then retailed them to its customers within the six San Francisco Bay Area counties.

Since these Pabco Asphalt Roofing Products had been manufactured by Fibreboard, not outside of California, but right in Fibreboard's Martinez plant and had been there sold to Ford for redistribution wholly in local commerce, these intrastate transactions would not support interstate commerce jurisdiction in this case—unless plaintiff could show that the transactions, although wholly intrastate, did in some way substantially affect interstate commerce.

Plaintiff, however, makes no such contention in this case nor is there any evidence that these intrastate transactions actually affected interstate commerce substantially or otherwise.

Plaintiff, therefore, has staked his jurisdictional interstate commerce claim in this case upon some evidence in the record to the effect that, apart from the Pabco Asphalt Roofing Products manufactured at Martinez and sold *intrastate* to Ford, Fibreboard had some other items on hand at its Martinez plant which had come from out of state and which, plaintiff claims, were such as to bring Fibreboard's termination of the parties' otherwise intrastate transactions and relationships so "within the flow" of interstate commerce as to indicate substantial effect on interstate commerce *as a matter of law* without need for plaintiff to show any actual effect, substantial or otherwise, on interstate commerce. (See, Las Vegas Merchant Plumbers Assn. v. United States, infra)

We agree with plaintiff that Las Vegas Merchant Plumbers Assn. v. United States, 210 F.2d 732 (9th Cir. 1954) has well established the law to the effect that "A case under the antitrust laws, so far as the interstate commerce element is concerned may rest on one or both of two the-

ories: (1) That the acts complained of occurred *within the flow* of interstate commerce. This is generally referred to as the 'in commerce' theory. (2) That the acts complained of, occurred wholly on the state or local level, in *intrastate* commerce, but substantially affected interstate commerce. Under both of these theories, the transactions complained of must affect or have an effect on interstate commerce or the requirements of the statute are not satisfied."

It is also true that *Las Vegas* Merchant Plumbers Assn., at pp. 748, 749, holds that, where the restraint complained of does occur "within the flow" of interstate commerce, then the test is qualitative, rather than quantative, and there need be no evidentiary showing of a substantial effect of the restraint upon interstate commerce (as would be necessary under (2), i.e., the quantitative test) since in such case, i.e., as to violations per se occurring in the stream of interstate commerce, "the proscribed and substantial effect of these illegal acts followed as a matter of law."[1]

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[1]It will be noted, however, that the *Las Vegas Merchant Plumbers Assn.* case reached this conclusion in a context involving alleged price fixing—a per se antitrust violation.

The question arises whether the same presumption of law would follow in a case where the evidence would support, not a per se antitrust violation, but, at best, a violation based upon the test of the unreasonableness of the restraint.

The court in *Las Vegas Merchant Plumbers Assn.* (pp. 748, 749) indicated that this presumption is limited to cases where the restraint complained of, not only occurs within the flow of interstate commerce, but is also a per se type of restraint.

In Yellow Cab Company of Nevada v. Cab Employers, Automotive & Warehousemen, Local # 881, 457 F.2d 1032 (Ninth Circuit, 1972), our Ninth Circuit again recently recognized this limitation when it referred to "the well-settled rule that, where the activities are interstate in nature, a per se violation of the Sherman Act presumes, as a matter of law, an effect upon interstate

It is true that, if a restraint occurs within the "flow" of interstate commerce, substantial effect on interstate commerce then follows as a matter of law and there is no need to show that any particular amount of interstate commerce was affected by the restraint.

The question here, however, is whether there was any such "flow" or stream of interstate commerce. Certainly, there should be some substantial evidence to establish the premise that there was in fact a "flow" of *interstate* commerce that was interrupted by the restraint.

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commerce, thus negating a showing of the amount of commerce involved."

This same limitation is also noted in United States v. Bensinger Co., 430 F.2d 584 (8th Cir. 1970) (recently cited but factually distinguished in Yellow Cab Company v. Cab Employers, etc., supra. In *Bensinger* the court held the law to be that, even where the alleged conspiracy occurs within the flow of commerce, the interstate commerce issue further depends upon whether the restraint was a per se antitrust violation, e. g., price fixing, which requires no further showing of the reasonableness of the effect on interstate commerce or whether it was the kind of conspiracy which is subject only to the test of "reasonableness." If the former, said the court, then, of course, there would be no need to show that the effect on interstate commerce was direct and substantial because that would follow as a matter of law. Where, however, the conspiracy, although occurring within the flow of commerce, is of a kind which is subject to the test of reasonableness, then, of course, that test must be met and it must be shown that the restraint in question was under all the circumstances an "unreasonable" restraint upon interstate commerce.

Although, at plaintiff's request, we instructed the jury upon a per se theory of the case as well as upon a reasonableness theory, we are convinced that there is no substantial evidence to support a per se restraint within the meaning of Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969) and that at best the evidence in this case would support only a restraint found to be "unreasonable" under the circumstances.

If these cases correctly state the law, we would have to conclude that, even assuming the restraint to have occurred "within the flow of interstate commerce," still, since there was no *per se* violation, plaintiff could not claim the presumption of law that the restraint substantially affected interstate commerce.

For reasons apparent in our memorandum, it is not necessary to rest our ruling upon a resolution of that question.

The Evidence Re Plaintiff's Interstate Commerce Theory

The other items relied upon by plaintiff to show a "flow" of *interstate* commerce as a premise for a *presumption of law* that such commerce was substantially affected are in effect as follows:

(1) Some "insulation material" manufactured, not by Fibreboard, but by others (Kaiser and Simpson) in Oregon and Washington, bought there by Fibreboard and brought to its Martinez plant at unspecified times and in unspecified amounts. This was not a Pabco product and there is no evidence that it was among the kind of products listed in the Fibreboard distribution policy statement (Ex. 2) or covered by the termination notice. Nor is there any evidence that this insulation material was brought to Martinez with any degree of regularity. There is some evidence that Ford (in addition to purchasing this insulation material directly from its manufacturer) had on occasion purchased some from Fibreboard's Martinez plant but there is no evidence as to when or in what amount. There is, no the other hand, evidence that, after Fibreboard's termination of Ford as one of its wholesale distributors, Ford continued to obtain this insulation material—either from its manufacturer or from other dealers—in the same manner as before the termination.

(2) Some other items, generally described as "specialty roofing materials" which had been made in Fibreboard's Portland, Oregon plant and on occasion brought to Martinez at unspecified times and in unspecified amounts (apparently when there had been a temporary shortage of

material at the Martinez plant during its start-up period). There is no evidence as to the nature of these items (i.e., whether they were Pabco Asphalt Roofing materials or any of the four products listed in Fibreboard's statement of its merchandising arrangements with plaintiff Ford and its other distributors. (Pltf's Ex. 2). Nor is there any evidence that any such transfers were regularly made. Even more importantly, there is no evidence that Ford had ever ordered or purchased any of these particular items from Fibreboard.

Plaintiff Ford contends, however, that upon this evidence, it could be found that Fibreboard's refusal to continue Ford as a distributor of its Pabco Asphalt Roofing Products, manufactured in the Martinez plant, became a transaction occurring "in the flow" of interstate commerce, in that Fibreboard's termination precluded Ford "from purchasing from Fibreboard products made in Washington and Oregon. . . ." (Pltf's Brief of 12/13/71 at p. 30).

As to (1) supra, i.e., the "insulation material" brought by Fibreboard from Oregon and Washington, it is difficult to understand from the evidence above summarized how plaintiff can seriously contend it was precluded by the termination of its distributorship from obtaining such insulation material when that material was not even a subject of the distributorship or the termination thereof.

This evidence, as thin as we have ever seen on an interstate commerce issue, falls far short of supporting a finding that defendants' termination of the parties' otherwise intrastate transactions and relationship occurred "within the flow" of interstate commerce.

As to (2) supra, some so-called "specialty" items brought from Fibreboard's Portland plant to its Martinez plant on some occasion, it is difficult to understand from the evidence above summarized how plaintiff can contend that it was precluded by the termination from obtaining those items—when there is no evidence that it ever did either order of receive any of them.

Here again, we conclude that this evidence is so thin as to fall far short of supporting a finding that defendants' termination of the otherwise intrastate transactions and relationship of the parties occurred "within the flow" of interstate commerce.

Upon the record in this case there is no substantial evidence that the termination significantly interrupted Ford's ability to obtain roofing material *except* the Pabco Asphalt Roofing Products manufactured at Martinez which it had been theretofore regularly receiving in an *intrastate* relationship under the terms of its Pabco distributorship arrangement.

There is no substantial evidence of any significant interference with any roofing materials which could be fairly said to have been "in the flow" of interstate commerce.[2]

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[2]It is not necessary to rest our ruling on a determination of a further question, raised by defendants, i. e., whether the out-of-state items brought to Martinez had ceased to be in interstate commerce when they "came to rest" in Fibreboard's Martinez plant.

Plaintiff, relying mainly on such cases as Binderup v. Pathe Exchange, Inc., 263 U.S. 291 at 309-311, 44 S.Ct. 96, 68 L.Ed. 308 (1923) and Walling v. Jacksonville Paper Co., 317 U.S. 564, 63 S.Ct. 332, 87 L.Ed. 460 (1943) contends that these two items from Oregon and Washington could be considered to have remained in the flow of interstate commerce. The court in Lo Cicero v. Humble Oil & Refining Company, 319 F.Supp. 1133, 1137 (E.D.La.1970), after consideration of Walling v. Jacksonville Paper Co., supra; Mitchell v. Livingston & Thebaut Oil Company, 256 F.2d 757 (5th

Even assuming there was a per se violation in this case and further assuming that the Oregon and Washington items were such that ordinarily they could be held to have remained within the flow of interstate commerce, the evidence in this particular case is so meagre as to be insufficient to support any finding other than these items were (as in the recent case of Yellow Cab Company v. Cab Employers, supra n. 1) so "miniscule" as to make it readily apparent that any combination here involved was directed, not at any interstate activity, but at intrastate activity.

Cir. 1958); Allesandro v. C. F. Smith Co., 136 F.2d 75 (6th Cir. 1943), summarizes the rules as follows:

Generally, under "flow of commerce" principles, goods shipped into a state are considered to remain within the flow under three circumstances: where they are purchased by the wholesaler or retailer upon the order of a customer with the definite intention that the goods are to go at once to the customer; where the goods are purchased by the wholesaler or retailer from the supplier to meet the needs of specified customers pursuant to some understanding with the customer although not for immediate delivery; and where the goods are purchased by the wholesaler or retailer based on anticipated needs of specific customers, rather than upon prior orders or contracts. In *Lo Cicero*, the court adds that the test is whether the warehouseman acts as an independent businessman or as an agent of the manufacturer, citing Mitchell v. Livingston & Thebaut Oil Company, 256 F.2d 757 (5th Cir. 1958), and on the nature of his customer, citing Walker Oil Co. v. Hudson Oil Co. of Missouri, 414 F.2d 588 (5th Cir. 1969), also a Robinson-Patman Act case.

Applying these tests to our present case, there is no evidence in the record that any of the items from Oregon and Washington were stored in Fibreboard's Martinez warehouse pursuant to any arrangement falling within the first two categories above set forth.

As to those items the best that could be contended is that they fell within the last category, i. e., they were brought to Martinez by Fibreboard, acting as a wholesaler, to serve the anticipated needs of specific customers—although not upon prior orders or contracts.

However, since neither the "insulation" material nor the "other" roofing material from Portland have been shown to be items covered by the Fibreboard Distribution Policy Statement, or to have been significantly requested or purchased by any specific distributor, including Ford, there is insufficient basis for holding that they were brought to Martinez "to serve the anticipated needs of specific customers."

In Yellow Cab Company v. Cab Employers, supra n. 1, where, as in the pending case, the interstate commerce issue depended upon the "in flow" theory, the Court said: "Given the miniscule amount of business generated by Yellow Cab's interstate activity, it is readily apparent that intrastate business was the subject of the conspiracy." The Court also said: "Although it is true that the courts have held that a small amount of interstate commerce is sufficient to obtain federal jurisdiction, they have done so when the nature of the conspiracy has been directed against interstate commerce," distinguishing in this respect such cases as United States v. Bensinger Co., supra n. 1; United States v. Yellow Cab Co., 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947), and Las Vegas Merchant Plumbers Assn. v. United States, supra, and noting that in the case before it the alleged conspiracy "was not directly aimed at the portion of plaintiff's business which involved interstate commerce" but at its "intrastate" activity and also adding the classic test of Page v. Work, 290 F.2d 323, 330 (9th Cir. 1961) that "the test of jurisdiction is not that acts complained of affect a business in interstate commerce but that the conduct complained of affects the interstate commerce of such business." The Court concluded that there was "no merit in the 'in commerce' theory propounded by Yellow Cab."

All that really appears in this case is plaintiff's claim that it has been somehow precluded from purchasing some items of unspecified nature and unspecified amount (and, therefore, presumably a minimal amount) occasionally brought from Portland to Martinez but—so far as the evidence shows—never even purchased by Ford.

It would be straining, indeed, to hold that a bare possibility that Ford might at some time acquire one or more of such items would transform an otherwise purely *intra*-state relationship into an interrupted "flow" of interstate commerce.

There is no violation of the antitrust statute where the restraint on interstate commerce is non-existent or so insignificant as to call for application of the de minimis rule. 58 C.J.S. Monopolies § 22 n. 31, citing San Francisco Industrial Assn. v. United States, 268 U.S. 64, 83, 45 S.Ct. 403, 69 L.Ed. 849 (1925), where the Supreme Court considered a situation "so insignificant as to call for application of the maxim de minimis non curat lex," adding, "To extend a statute intended to reach and suppress real interference with the free flow of commerce among the several states to a situation so equivocal and lacking in substance would be to cast doubt upon the serious purpose with which it was framed."

This has been recognized by our Ninth Circuit in Yellow Cab Company v. Cab Employers, supra n. 1, where the court accepted appellee's contention that "the district court did not err when it deemed Yellow Cab's interstate business to be de minimis to its intrastate activity."

For the foregoing reasons the court has reached the conclusion that the evidence on the interstate issue is wholly insufficient, or at least so insubstantial and lacking in probative value, that there is no evidence whatsoever from which the jury might rationally have concluded that defendants restrained interstate commerce; that defendants' motion for judgment in defendants' favor notwithstanding the verdict, should for that reason be, and is,

hereby granted with the alternative provision that, in the event such order should for any reason be set aside or reversed on appeal, the order (hereby made) for a new trial on the interstate commerce issue, unless also set aside or reversed on appeal, shall remain in effect. (See Rule 50(c), F.R.Civ.P., and Moist Cold Refrigerator Co. v. Lou Johnson Co., 249 F.2d 246 (9th Cir. 1957).

Otherwise defendants' motions for judgment notwithstanding the verdict and/or for new trial are denied.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 72-2570

Ford Wholesale Company, Inc. of San Jose, a corporation,
Appellant,
vs.
Fibreboard Paper Products Corporation; State Shingle Co., Inc.; Wholesale Building Supply, Inc ; and Lone Star Cement Company,
Appellees.

[February 20, 1974]

OPINION

Appeal from the United States District Court
for the Northern District of California

Before: CHAMBERS and KOELSCH, Circuit Judges, and EAST,* District Judge

EAST, Senior District Judge:

The plaintiff-appellant (Ford) instituted this private antitrust action for damages under Section 4 of the Clay-

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

ton Act [15 U.S.C. §15] against the defendant-appellee Fibreboard Paper Products Corporation (Fibreboard) and the remaining above-named defendants alleging that Fibreboard and the other defendants "combined and conspired to monopolize, attempted to monopolize and did monopolize trade and commerce in the relevant market in violation of Sections 1 and 2 of the Sherman Act [15 U.S.C. §§1, 2]."

The proceedings in the District Court progressed through a jury verdict in favor of Ford for a substantial amount.

Thereafter, the District Court upon various motions of Fibreboard concluded "that the evidence on the interstate issue [was] wholly insufficient, or at least so insubstantial and lacking in probative value, that there is no evidence whatsoever from which the jury might rationally have concluded that defendants restrained interstate commerce;", set aside the jury verdict and judgment thereon in favor of Ford and on May 30, 1972, entered judgment for Fibreboard that the action be dismissed with costs to neither party.

Ford appeals and Fibreboard makes no cross-appeal from various adverse orders.

Ford asserts and we agree that "[t]he sole question before this court [on appeal] is whether the District Court was erroneous in ruling that interstate commerce was not involved in the defendants' anticompetitive conduct which otherwise constituted a violation of Section 1 of the Sherman Act. [15 U.S.C. §1.]"

Assuming arguendo then that there was sufficient material evidence in the record to support the jury's finding

on the *substantive issue* of Fibreboard's anticompetitive conduct, we turn to the *jurisdictional issue* of interstate commerce involvement of Fibreboard's anticompetitive conduct.

The record evidence on that issue is ably marshaled, surveyed and analyzed in the Memorandum of Decision of the District Court reported in *Ford Wholesale Company, Inc. of San Jose v. Fibreboard Paper Products Corporation, et al.*, 344 F.Supp. 1323 (1972); and from our review of the record we are satisfied to refer to and rely upon that marshaling as a statement of facts herein.

We conclude for the same reasons and upon the same legal grounds set forth in the District Court's Memorandum of Decision that the judgment entered thereon is correct in fact and at law.

Also, we are satisfied that the rationale utilized by the District Court for its judgment is wholly compatible with and justified under the test of the independent jurisdictional interstate commerce issue under the Sherman Act as correlated from prior authority and delineated in *Rosen v. Rossmoor Corporation, Golden Rain Foundation, Leisure World Foundation,* and *Crestmark Carpet and Drapery Company,* 9th Circuit, number 26,475, October 17, 1973.

> "The jurisdictional issue under the Sherman Act is distinct from the substantive issue of whether a given defendant's conduct was of the kind prohibited by the Act. *Rasmussen v. American Dairy Ass'n,* 472 F.2d 517, 521-24 (9th Cir. 1973). The jurisdictional issue is one of constitutional power. Congress intended to extend the substantive prohibitions of the Sherman

Act to the farthest reaches of its power under the Commerce Clause, thereby mandating for this nation a competitive business economy to the full extent that Congress could do so under its constitutional power to regulate interstate and foreign commerce. *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 558-59 (1944). The jurisdictional question, therefore, is whether defendants' conduct had a sufficient relationship to interstate commerce to be subject to regulation by Congress. *Rasmussen v. American Dairy Ass'n, supra,* 472 F.2d at 521. This, in turn, depends upon whether defendants' conduct had a 'substantial economic effect' upon interstate commerce, or, ' "concerns more States than one" and has a real and substantial relation to the national interest' in a competitive economy." Citing authorities, at pages 3 and 4, slip opinion;

'Thus, although the substantive and jurisdictional issues are often confusingly described in terms of the 'effect' of particular conduct upon commerce, as if a common question were presented, *see, e.g., Las Vegas Merchant Plumbers Ass'n v. United States,* 210 F.2d 732, 739-40, n.3 (9th Cir. 1954), the substance of the two inquiries is quite different. An unreasonable restraint on competition may have no impact upon interstate commerce, or an impact so insignificant that regulation under the Commerce Clause is not justified as a means of protecting interstate commerce. *Page v. Work,* 290 F.2d 323, 331-32 (9th Cir. 1961)." and

"When the issue is whether jurisdiction exists, the focus is upon interstate commerce: whether the defendant's conduct—unreasonably restrictive of competition or not—has a sufficient impact on interstate commerce to justify regulation under the Commerce Clause."

It is manifest from the record that Fibreboard's anti-competitive conduct had no significant impact on interstate commerce to justify regulation under the Commerce Clause.

When the test of *Rosen* was applied to the facts in that case, it was apparent that the defendants' anticompetitive conduct directly and substantially interfered with distribution of goods "in the flow" of interstate commerce in that carpeting coming into California from other states could not meet their destined use but remained in the warehouse of *Rosen.*

Likewise, the undisputed facts in *Copp Paving Co., Inc. v. Gulf Oil Co., et al.,* 9th Circuit, number 72-2152, October 3, 1973, also relied upon by Ford, presented an anticompetitive conduct plagued interstate enterprise so patently diverse from Ford's enterprise and its non-involvement in interstate commerce that further comment is not warranted except to say *Copp* was engaged in producing "instrumentalities of interstate commerce."

AFFIRMED.

Appendix C

United States Court of Appeals
for the Ninth Circuit

No. 72-2570
DC 45977 WTS

Ford Wholesale Company, Inc. of San Jose, a corporation,
Appellant,
vs.
Fibreboard Paper Products Corporation; State Shingle Co., Inc.; Wholesale Building Supply, Inc.; and Lone Star Cement Company,
Appellees.

[Filed Apr. 5, 1974]

ORDER DENYING PETITION FOR REHEARING

Before: CHAMBERS and KOELSCH, Circuit Judges, and EAST, District Judge

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

All active judges of the court have been notified of the suggestion for a rehearing en banc and none has voted for a rehearing en banc.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1944

FORD WHOLESALE COMPANY, INC.,
Petitioner,

vs.

FIBREBOARD PAPER PRODUCTS CORPORATION,
Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

E. JUDGE ELDERKIN
THOMAS A. WELCH
BROBECK, PHLEGER & HARRISON
111 Sutter Street, Suite 1100
San Francisco, California 94104
Telephone: (415) 434-0900
Counsel for Respondent

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1944

FORD WHOLESALE COMPANY, INC.,
Petitioner,

vs.

FIBREBOARD PAPER PRODUCTS CORPORATION,
Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Respondent, Fibreboard Corporation (formerly known as Fibreboard Paper Products Corporation and hereinafter referred to as "Fibreboard") opposes the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed with this Honorable Court on or about June 29, 1974 (hereinafter referred to as the "petition"). The petition is wholly devoid of any merit. This is revealed not only by its contents and the analysis presented herein but by the fact that petitioner, *Ford Wholesale Company, Inc.*, a California corporation, while

a party to related litigation heretofore dismissed by the United States District Court for the Northern District of California[1], and affirmed by the United States Court of Appeals for the Ninth Circuit[2], for lack of diligent prosecution by Ford Wholesale Company, Inc., *is not a party to the case for which review is sought by the instant petition.* The plaintiff and appellant below in the case for which review is sought by this petition is a *different* corporation, *Ford Wholesale Company, Inc. of San Jose,* a California corporation, which is evident from the case titles of the opinions below reprinted as appendices to the petition and from the opinions below as reported.[3]

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California in *Ford Wholesale Company, Inc. of San Jose v. Fibreboard Paper Products Corporation* is reported at 344 F. Supp. 1323, and the opinion of the United States Court of Appeals for the Ninth Circuit in *Ford Wholesale Company, Inc. of San Jose v. Fibreboard Paper Products Corporation* is reported at 493 F.2d 1204.

JURISDICTION

It is submitted that the jurisdiction of this Court has *not* been invoked pursuant to 28 U.S.C. § 1254 because the petitioner herein, Ford Wholesale Co., Inc., was not a

1. Ford Wholesale Company, Inc. v. Fibreboard Corporation, No. C-48911 RHS, U.S.D.C., N.D. Calif.
2. Ford Wholesale Company, Inc. v. Fibreboard Corporation, No. 71-2819, affirmance of dismissal with prejudice issued February 20, 1974.
3. Because of several inaccuracies in the reprint of the opinions below contained in the Appendices of the petition, we hereinafter cite to the official reports of these opinions.

party below[4] and has no standing to seek review of the decision below, and the time allowed for filing of a petition for writ of certiorari by 28 U.S.C. § 2101(c) on behalf of a party to the case below has expired as of July 5, 1974,[5] without any application for extension.

In any event, this case is not an appropriate subject under the criteria of Rule 19(1)(b) of the Supreme Court Rules since: (a) there is no conflict with a decision of another court of appeals presented by this decision; (b) no territorial or state law question is involved; (c) no unsettled question of federal law is involved; (d) nor is any conflict with applicable decisions of this Court presented by the decisions of the lower courts in this case.[6]

STATUTES INVOLVED

The *only* statute involved is Section 1 of the Sherman Act (15 U.S.C. § 1), which is set forth in the petition, page

4. 28 U.S.C. § 1254, whereunder petitioner claims the valid invocation of this Court's jurisdiction (Petition, p. 2), provides that cases in the courts of appeals may be reviewed by the Supreme Court: "(1) By writ of certiorari granted upon the petition of *any party* to any civil or criminal case, before or after rendition of judgment or decree".

5. 28 U.S.C. § 2101(c) provides that any writ of certiorari intended to bring a judgment in a civil action before this Court for review "shall be . . . applied for within ninety days after the entry of such judgment or decree. In this case that ninety days began to run on April 5, 1974, when the Court of Appeals denied rehearing (Petition, Appendix C; Dept. of Banking v. Pink, 317 U.S. 264, 266 (1942).

6. Petitioner has, by page 6 of the petition, altered substantially its own first-stated version of the question presented (Petition, p. 3) to "the sole question presented by this petition is whether there was evidence from which the jury could have found [even though the jury never considered it] that interstate commerce was involved". Petitioner invites this Honorable Court to survey whether "on a reading of the record, the evidence is sufficient". If that be so, there is no semblance of qualification for consideration by this Court of petitioner's bid for another appellate review of the record evidence.

3. We do not agree, nor does either version of the question presented as stated by petitioner (Petition, pp. 3, 6) agree, that Section 2 of the Sherman Act is or could be in any way involved.

QUESTION PRESENTED

The sole question considered and decided by the Court of Appeals was whether the trial court was clearly erroneous in assessing that the evidence presented by petitioner on the involvement of the acts complained of in the flow of interstate commerce was too insufficient, insubstantial and lacking in probative value to warrant a finding by the trial court, as the agreed upon trier of fact on this issue, of the requisite involvement in interstate commerce.

STATEMENT OF THE CASE

Accepting petitioner's statement of the nature of the case (Petition, pp. 3-4), Fibreboard offers the following alternative and, it submits, more complete statement of the facts of the case and the proceedings below.

(A) Background of the Case

This case arises out of the deterioration and termination of Fibreboard's relationship with Ford[7] as a wholesale distributor of PABCO Asphalt Roofing Products in the fall of 1963. Fibreboard manufactured PABCO products until August, 1968, in its Portland, Oregon, plant and in its California regional plants at Martinez, Emeryville and Wilmington (near Long Beach). Fibreboard marketed PABCO products in the San Francisco Bay six counties area through 15 designated wholesale distributors. From 1961 until De-

7. We hereinafter refer to Ford Wholesale Co., Inc. of San Jose, a California corporation, as "Ford" and continue to refer to petitioner Ford Wholesale Co., Inc., as "petitioner".

cember, 1963, Ford was a wholesale distributor of PABCO Asphalt Roofing Products[8] in the San Francisco Bay six counties area. As of December, 1963, Ford, along with its affiliate corporations, who had acted as Fibreboard's sole wholesale distributors in Southern California since 1960 and were controlled by the same stockholders (T. 443-44, 589-90, 595-96)[9], was terminated effective at the end of the year as a wholesale distributor of PABCO Asphalt Roofing Products by written notice given in late October, 1963. (Exh. 7; R. 422-23, 433-35, 1018-19; T. 396.)

The termination was precipitated by Ford's effort to establish a warehouse inventory of PABCO and a distribution outlet in Oakland, California, in October, 1963. Fibreboard, who had sold PABCO F.O.B. its San Francisco Bay Area plants to San Jose and San Francisco warehouse outlets of Ford in 1961 and 1962, refused to sell PABCO to Ford's new Oakland outlet on the basis of its expressed business judgment that its East Bay distribution of PABCO was firmly adequate through the five existing East Bay warehouse outlets, operated by the originally named co-defendant distributors, States Shingle Co., Wholesale Building Supply Co., and Pacific Cement and Aggregates[10], and

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8. The distributorship arrangement was memorialized in Fibreboard's Merchandising Policy for Asphalt Roofing Products (Exh. 2; T. 102, 104) and covered standard asphalt shingles, roll roofing and felts; bonded line asphalt shingles and roll roofing; roof coatings, cements and asphalt emulsions; and PABCO-WEB roofing.

9. Fibreboard has adopted throughout this brief the system of citations to the record on appeal followed by petitioner (Petition, pp. 4, 7 nn. 1 and 2) and also cites the documentary exhibits of record as "Exh.".

10. These named co-defendants were all dismissed before or during trial. Pacific Cement and Aggregates ("PCA") was sued through its successor corporation, Lone Star Cement, and was dismissed by stipulation at an early stage (R. 195.) States Shingle Co. ("States") was insolvent at the time of trial, and was dismissed during trial by stipulation. Wholesale Building Supply Co. ("WBS") was also dismissed at the same time as States. (T. 213; R. 638-39.)

its concern over the dominating role Ford and its affiliates had assumed in its overall California distribution of PABCO. (T. 592, 600.) As it had done before, Fibreboard continued to sell full load or split load drop-shipment lots to Ford bound for delivery points in the East Bay. (T. 463-64.) Ford contended that this refusal to sell PABCO to Ford's third outlet in the San Francisco Bay Area and the eventual termination of Ford and its affiliates as PABCO Asphalt Roofing Products wholesale distributors, was induced by pressure and threats against Fibreboard from States and WBS, even though Ford and its affiliates accounted for three times the PABCO products distribution volume of States and WBS combined. (Exhs. 16, 17; T. 528-29, 688-89.) The termination occurred after Ford diverted several shipments of PABCO products from their intended drop-delivery destinations in the East Bay to stock its Oakland warehouse and had threatened to terminate its and its affiliates' distributorships for PABCO products all over California if Fibreboard would not initiate sales to Ford's Oakland warehouse inventory. (T. 593-600.)

Immediately after termination notice was given Ford took on distributorships for Lloyd Frye roofing products, Celotex roofing products and, later, Pioneer Flintkote roofing products—all competitive with PABCO Asphalt Roofing Products. (T. 714-15.) In each of the years after termination in which Ford claimed damage from loss of profits, Ford's sales were higher and its gross profits were higher than in any year in which it distributed PABCO prior to termination by Fibreboard. (Exhs. L, M, 19; T. 827, 831, 836, 653-654, 758-59.)

(B) The Proceedings in the Trial Court

Ford initially filed suit in the United States District Court for the Central District of California in January,

1965. (R. 95.) After considerable discovery was taken and the Central District court case was transferred to the Northern District of California, Ford refiled in the United States District Court for the Northern District of California, adding States, WBS and Lone Star Cement (PCA) as defendants, in November, 1966. (R. 79.) After considerably more discovery was taken by Ford, its counsel filed a pretrial statement in February, 1970, representing that all discovery for Ford was completed and that Ford needed no further trial preparation. (R. 265.) No further discovery by Ford was, in fact, taken.

Fibreboard adopts, as further statement of the proceedings in the trial court, petitioner's statement on pages 4 and 5 of the petition down to the last paragraph on page 5, except to add that Fibreboard's two motions for a directed verdict and to strike Ford's damage evidence were made at the close of Ford's case and at the close of all the evidence on the additional grounds of inadequacy of the evidence to support a verdict for Ford, in various particulars. (T. 802-03; 916-17.)

Throughout the presentation of Ford's case, and in chambers at the session on jury instructions, discussed by the trial court's opinion (344 F. Supp. at 1325) Fibreboard maintained the position that Ford's evidentiary demonstration on interstate commerce involvement was inadequate, as a matter of law and the trial court was bound to rule for Fibreboard on its motion for a directed verdict because of this essential discrepancy. (R. 627-33.) If Fibreboard were wrong in that position, the trial court would have then determined that there was sufficient evidence for reference of the matter to the jury. However, Ford

withdrew its instruction and advised the court that it acquiesced in withdrawing the issue from the jury.[11]

(C) The Evidence Offered of Involvement with Interstate Commerce.

The trial court found as a fact that Ford purchased the PABCO Asphalt Roofing Products it resold pursuant to its distribution agreement with Fibreboard in the six Bay Area Counties from Fibreboard's Bay Area plants, where they were manufactured. (344 F.Supp. at 1325) As much was admitted by witness Thomas, Ford's president, when he acknowledged (T. 434) that the PABCO that Ford bought from Fibreboard was manufactured in California. There never was any evidence introduced that *any* Fibreboard product purchased by Ford was manufactured out of state.[12] What little evidence Ford introduced as to out-of-state purchases or sales falls into four categories:

1. Roofing insulation material—not manufactured by Fibreboard and not one of the asphalt roofing products for

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11. The lower court had every basis to interpret this move as a stipulation that "the court, not the jury, should make the ruling upon the interstate commerce issue in this case". (344 F.Supp. at 1325.) Petitioner appears to agree with that view on the court's part also (Petition, pp. 5-6), but it draws the perfect nonsequitur conclusion from it: "If on a reading of the record the evidence is sufficient for submission to the jury, then—in this case—plaintiff has satisfactorily established a restraint on interstate commerce." To the contrary, with the lower court acting as trier of this fact issue by stipulation, its determination can only be overturned if clearly erroneous. Federal Rule of Civil Procedure 52(a).

12. Petitioner is erroneous in its representations as to the "undisputed facts" in the Pretrial Order (R. 433-36). There it was admitted that Fibreboard manufactured roofing products in Oregon and that Fibreboard "has manufactured and sold roofing products outside the State of California". (R. 434—emphasis added.) There is no basis in these admitted facts for petitioner's conclusion that it was "clear . . . prior to trial that some of these Oregon produced roofing materials were shipped across state lines from Oregon to the relevant market in California". (Petition, p. 9.)

which Ford acted as a wholesale distributor of PABCO—which was purchased by Ford both from Fibreboard, as middleman, and directly from the manufacturers, Kaiser and U.S. Gypsum. The termination of Ford as a PABCO distributor didn't bear on this material,[13] and as the trial court found as a matter of fact, Ford's purchases of non-PABCO material continued after termination by Fibreboard much the same as they had before. (T. 711-14; 344 F.Supp. at 1327.)[14]

2. Roofing materials manufactured by Fibreboard in Portland, Oregon and, purportedly when local production fell short, shipped into the Martinez plant inventory. As the trial court found as a matter of fact, no evidence was introduced to show: (1) that Ford ever bought any such material; (2) that any such shipments ever occurred when Ford was a PABCO distributor; (3) in what quantity, if any, such material purportedly moved into Martinez general inventory; or (4) whether any of it was material covered by the subjects (See Exh. 2; T. 102, 104) of Ford's distributorship. (344 F.Supp. at 1327.) Moreover, as the trial court also found, no evidence was elicited to the effect that any transfers were made pursuant to specific orders placed by Ford or to serve the anticipated needs of Ford

13. Exhs. 2, 7; T. 102, 104, 396. The termination notice stated to Ford "your distributorship for our roofing products is hereby terminated," and the wholesale distributorship policy statement, under which Ford operated as a distributor for PABCO (T. 103-05), covered no roofing insulation material at all. (344 F.Supp. at 1327.) Neither the Complaint (R. 3-6) nor the Pretrial Order (R. 434-36) raised any issue as to restraint of trade in non-PABCO roofing products.

14. The reprint of the opinion of the trial court, Appendix A to the petition, is in error. The last sentence of part "(1)" on p. vii of Appendix A to the Petition should read "There is, *on* the other hand, evidence that, after Fibreboard's termination of Ford as one of its wholesale distributors, Ford continued to obtain the insulation material (etc.)."

or that Ford's termination had the slightest bearing on any such shipments in any respect. (*Id.*, p. 1328, n.2.)

3. Sales by Ford to roofing contractors for out-of-state job sites. In the first place, the pretrial order stipulated that Ford's business of the marketing, selling and distribution of roofing products was confined to the six San Francisco Bay Area counties. (R. 433.) The trial court, therefore, properly disregarded evidence contrary to that undisputed fact. What was offered, moreover, was testimony of Ford's president that *Ford* sometimes shipped *its* materials outside California, with no specification of whether any of it was material that was covered by the terminated PABCO wholesale dealership arrangement or when any such shipment occurred.

Ford's sole Sales Manager since its inception (T. 269) recalled only a single instance of a sale for a Nevada job site during the entire relevant period (T. 278) and not one single sale to a retail distributor located out of state (T. 277.)

4. Other purchases of accessory items by Ford from out-of-state suppliers. There was testimony that, like any business in modern life, Ford purchased an array of items for resale from wholly unrelated suppliers. (T. 431-34.) None of these purchases or materials were alleged to be competitive with Fibreboard's products or in any way related to Ford's distributorship of PABCO. The fact of their purchase, there being no claim of alteration or effect by Ford's shift from the PABCO to the Fry and Celotex lines of asphalt roofing, was simply irrelevant to the interstate commerce involvement *of the acts complained of*, and it was properly so treated by the trial court.

From this thin fare, which we review in further detail below, Ford argued it had demonstrated that the acts com-

plained of occurred *in the flow of* interstate commerce—eschewing any attempt to qualify its case under the alternative theory of purely local restraint which "substantially affects" interstate commerce.[15]

The Court of Appeals for the Ninth Circuit reviewed the trial court's opinion and appraisal of the evidence and found the trial court's decision in entering judgment notwithstanding the verdict for Fibreboard for lack of sufficient proof of involvement of the acts complained of in interstate commerce to have been correct. (493 F.2d 1204.) Moreover, the Court of Appeals unanimously declined to reconsider upon application for rehearing *en banc*. (Petition, App. C.) Petitioner now resorts to this Honorable Court for remedy of Ford's failure at the trial level to elicit sufficient evidence to prove the essential element of involvement of the acts complained of in interstate commerce. Realizing the office of this Court to be concern with substantial questions of law of national significance rather than the review of evidentiary materials to determine whether the quantum of evidence has been properly appraised by a lower trial court and the court of appeals in a given case, we, nevertheless, respond to petitioner's one-sided portrayal of the evidence (Petition, pp. 11-16), such as it was, presented to the trial court on the issue of involvement of the acts complained of in the flow of interstate commerce.

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15. Ford's counsel stated to the lower court in argument on the motion for judgment N.O.V. (T. 1127):

"THE COURT: So you take the position . . . .

MR. BLECHER: This is an in flow case.

THE COURT: This is an in flow case, that is your position?

MR. BLECHER: Correct. Now, let me show what the evidence is on this case."

The trial court concluded from this that there was no claim that Ford had demonstrated, or could demonstrate, an actual effect on interstate commerce by reason of its termination by Fibreboard. (344 F.Supp. at 1325.)

1. THE EVIDENCE OF INTERSTATE SHIPMENT AND PURCHASE BY FORD OF ROOFING INSULATION

The *only* testimony bearing on purchases of roofing insulation by Ford through Fibreboard was that of witness Thomas set forth in the petition at pages 14 and 15. However, Thomas also testified immediately thereafter that Ford bought roofing insulation material directly from Kaiser in substantial quantities during the same period while handling PABCO products. (T. 430-33):

> "Q. All right. Now, were there any materials that, independently of Fibreboard, and during the period that you had their products, you purchased from suppliers located outside the State of California?
>
> A. Yes, sir. Many of them.
>
> Q. Would you name some of the items you bought and the approximate quantities of your purchase?
>
> • • •
>
> THE WITNESS: During the period of 1961 through 1963, that period that we handled Fibreboard or PABCO, we purchased materials from Carey Company. We shipped from the East a number of plants. We purchased the material directly from the Kaiser Company that shipped from Oregon. We purchased material from Keystone Steel and Wire, which shipped from Illinois—
>
> • • •
>
> MR. BLECHER: Q. Can you list for us the names of the principal manufacturers who supplied you such items, Mr. Thomas?
>
> A. Kaiser Company.
>
> Q. And what was the item?
>
> A. Roofing insulation.
>
> Q. And did you buy this in substantial quantities?
>
> THE COURT: Where do they manufacture?
>
> THE WITNESS: In Oregon.
>
> THE COURT: And they ship down here?

THE WITNESS: Yes, sir.

MR. BLECHER: Q. And did you sell this along with PABCO roofing materials on jobs in California?

A. Yes, sir, we did.

MR. BLECHER: Q. PABCO didn't make roof insulation is that right?

A. No, Sir.

Q. So you had, in order to sell a complete line of items to put on a roof—you had to buy certain items that PABCO didn't have?

A. Yes.

Q. This is what we're talking about?

A. Yes.

Q. One is called "insulation"?

A. Yes.

Q. You bought that from Kaiser?

A. It was made in Oregon or Washington, yes."

Mr. Ornelias, Ford's Sales Manager, testified also that from Ford's inception in 1960 and continuing through and after its association with PABCO products Ford "represented" Kaiser in insulation and various other products. (T. 271.)

It was also further elicited from witness Thomas that non-asphalt roofing accessory items, including roofing insulation, comprised about the same percentage of Ford's sales after termination as they had before termination. (T. 712-13.) These sales increased after termination (Exh. L; T. 826-27, 831).

The most salient point, however, is that roofing insulation *was not the subject of this lawsuit.* Fibreboard (PABCO) made no roofing insulation; Ford's distributorship for PABCO covered asphalt roofing products, but that distributorship, the alleged "pressures" from Ford's competitors, and Ford's eventual termination as a distributor

of PABCO by Fibreboard did *not* involve roofing insulation (Exh. 2; T. 102, 104); no claim was ever made, nor was evidence introduced, that Fibreboard ever refused to sell roofing insulation materials to Ford or anyone else; and there was no claim that Fibreboard or anyone else conspired to restrain trade in roofing insulation manufactured by Kaiser or some other entity. (R. 3-6.)

The roofing insulation, therefore, stands as an example of Ford's interstate business, perhaps, but it has no value in demonstrating that Fibreboard committed acts within or affecting the interstate commerce part of Ford's business.[16]

2. THE EVIDENCE OF INTERSTATE MOVEMENT OF PABCO PRODUCTS FROM OREGON TO CALIFORNIA

Not one of the Ford owners and officers who testified said one word about Ford having bought any PABCO products manufactured in Oregon. Neither did any other witness. Ford bought from the Martinez or Emeryville, California, plant general inventory, which was manufactured right on the site. Witness Thomas, Ford's president, so confirmed in his testimony. Immediately following the testimony quoted above, concerning Ford's purchases of roof insulation, and testimony of Ford's purchases of other accessory products from out-of-state suppliers, the following colloquy with the trial judge occurred (T. 434):

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16 As stated in Page v. Work, 290 F.2d 323, 330 (9th Cir. 1961), cert. denied, 368 U.S. 875, the criterion is "not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." See also Von Kalinowski, Antitrust Laws and Trade Regulation, § 5.01[1] [2], p. 5-3 (1969); Gough v. Rossmoor Corporation, 487 F.2d 373, 376 (9th Cir. 1973); In Re Western Liquid Asphalt Cases 487 F.2d 202, 204 (9th Cir. 1973); Yellow Cab Co. of Nevada v. Cab Employees, etc. 457 F.2d 1032, 1034 (9th Cir. 1972); Lieberthal v. North Country Lanes, Inc. 332 F.2d 269, 272 (2nd Cir. 1964); United States v. The Bensinger Co., 430 F.2d 584, 588 (8th Cir. 1970).

"THE COURT: Yes. As far as the Fibreboard product, that you bought from Fibreboard. That was PABCO. As I understand, they were manufactured in California?

THE WITNESS: Yes, sir. They were."

That is the *only* testimony in the record concerning the origin of the PABCO products *bought by Ford*. Even though relevant documentary material was made available to Ford's counsel during the trial (R. 954-55) none of it was ever offered or alluded to by Ford.

Now petitioner relies on the brief testimony of witnesses La Plant and Hoover for establishing a "flow of commerce" from Portland, Oregon, to the Bay Area PABCO distributors. (Petition, pp. 11-13.) Mr. La Plant's testimony, as quoted (*Id.*, pp. 11-12), amounts to no more than affirmance that at some time in his nine years of experience between 1956 and the end of 1963, as the Alameda County salesman, he knew that some materials were shipped from the Portland plant for Bay Area distributors.[17] Mr. La Plant's experience related to the Alameda County distributors only (T. 57, 60, 61)—States, WBS and PCA. Fibreboard was selling to Ford in the East Bay on a drop shipment or full load shipment basis only (T. 149, 274-75, 463-64), therefore it is quite consistent for Mr. La Plant to have stated that his knowledge of shipments from Portland, on occasion, related to items destined for States—an East Bay outlet distributor—and to testify, as he did, that he "couldn't say" as to any such shipment being made to Ford. (T. 80.) It should also be noted that the context of this testimony was that it was "incidentally" brought up in the course of

17. Counsel's question was whether "*any* materials produced at . . . the Portland, Oregon plant were *ever* delivered down here for distribution to wholesalers". (Petition, p. 11, emphasis added.)

a discussion about a temporary product shortage from the Martinez facility when it first opened. Thus, the testimony immediately preceding that quoted by Ford is (T. 80):

> "A. No, there were shortages from time to time, but this was a particularly bad shortage.
>
> Q. This was the one occasioned by the fact that you had just started operation of a new plant and there were some bugs in the plant and you were falling behind on your production schedule?
>
> A. That's correct.
>
> Q. Ultimately you got the bugs out?
>
> A. Yes."

Thus, La Plant's testimony showed no knowledge of any "flow" of PABCO products from Portland, Oregon, to Ford, and its context related to the problem of meeting a situation of temporary short supply from the local production plant, which was rectified.

The subsequent testimony by witness Hoover does not support any inference of shipments to Ford from Portland. Moreover, it is simply false to characterize that testimony as stating that the Portland, Oregon, plant supplied any part, let alone the "second largest source of supply" (Petition, p. 12), for the San Francisco Bay Area. What Mr. Hoover testified was that he didn't know that any PABCO products were shipped from Portland, Oregon to the San Francisco Bay Area. Mr. Hoover's full testimony on this matter is (T. 181-83):

> "Q. Incidentally, did any of these—any of the products that were sold by the distributors in the Bay Area come into this area from your Portland, Oregon plant from time to time?
>
> A. I don't know that they did.
>
> THE COURT: Now, you testified a little while ago, as I recall, you manufactured these materials at Martinez.

THE WITNESS: Yes, but we also had two more manufacturing plants. One was in Portland, Oregon and one was in Wilmington in the Los Angeles area.

THE COURT: Well, do you know from what plant the building materials—what plant of yours the building materials were shipped into for the East Bay Area?

THE WITNESS: Well, the greatest bulk of them would come out of Martinez.

THE COURT: All right. And what about the residue after the greatest bulk from Martinez?

THE WITNESS: Well, that is the point. They may have been shipped from Portland. Some may have.

THE COURT: What do you mean 'may have'.

THE WITNESS: I don't know any specific instances.

THE COURT: How about Wilmington?

THE WITNESS: From time to time, I'm sure that there were, but I could not name a specific instance.

THE COURT: From Wilmington, California?

THE WITNESS: I can't name any at the moment.

MR. BLECHER: Q. Were some items in the line Mr. Hoover made only in Portland? Certain kinds of wood shingles—

A. I don't believe so.

Q. Well—

A. Not to my knowledge at the moment.

Q. Well, Mr. La Plant told us yesterday that the Portland Plant shipped materials down into the Bay Area. Would you dispute that?

A. No.

Q. You would be willing to accept that as accurate?

MR. ELDERKIN: Well, Your Honor, Mr. La Plant's testimony—

THE COURT: You don't have to accept that".

Mr. Hoover's testimony on this subject added exactly nothing to the evidence. Whereas, Mr. Hoover was of the opinion that, from time to time, some materials were shipped into the San Francisco Bay Area from Wilmington,

California, he could not say the same as to any shipments from Portland, Oregon.[18]

Thus, the lower court was fully warranted in finding, as it did (344 F. Supp. 1327, 1328) that:

(1) No evidence showed when or in what amount any PABCO materials came into the San Francisco Bay Area from Portland, Oregon;

(2) No evidence showed that any of the materials supposedly brought in were those, or included in those, which were the object of Ford's distributorship for PABCO (Exh. 2; T. 102, 104); and

(3) No evidence showed that Ford ever ordered or received any such material or that its termination could have possibly had any influence on its movement.

Like the roofing insulation category, the supposed Portland, Oregon-San Francisco Bay Area transfer of PABCO products is not relevant to the issue. If the evidence were adequate to show that any such movement, in fact, took place other than only on select occasions, it might demonstrate an interstate aspect of Fibreboard's business. In doing so, however, it would not thereby demonstrate an effect on the interstate aspect of that business, let alone Ford's business, as a result of the termination complained of.[19]

3. THE EVIDENCE OF OUT-OF-STATE SALES BY FORD

Petitioner relies upon witness Thomas' testimony[20] that

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18. This Court judicially knows that highway mileage from Portland, Oregon to the San Francisco Bay Area (approx. 650 miles) is considerably more than from Wilmington, California, near Long Beach (approx. 425 miles). Rand McNally Road Atlas (Rand McNally Co. 1971).

19. See footnote 16, above.

20. Witness Thomas' first hand knowledge of the details of Ford's sales was never demonstrated. He had only infrequent contact with the day to day business of Ford (T. 356-57), and he did not purport to be testifying from Ford's records of sales—none of which were ever introduced.

sales were made at an unspecified time in unspecified amount to one contractor located in Medford, Oregon. (Petition, p. 15.) As to the supposed Oregon contractor, there was no testimony where the goods sold were delivered —to a job site in California or to Oregon. (T. 434-35.) Witness Ornellas, Ford's Sales Manager during the entire relevant period, had no recollection of any shipment to a contractor located out-of-state (T. 277). Ford stipulated as an "undisputed fact" in the final pretrial order (R. 433):

> "Plaintiff . . . was organized for and has been engaged in the business of the marketing, selling and distribution of roofing products which it has sold throughout Santa Clara, Alameda, San Francisco, Contra Costa, Monterey and San Mateo Counties."

Moreover, Ford's October 1, 1963-September 30, 1964, State Income Tax Return (Exh. 30, Items 39 and 40, pp. 1-2; T. 621, 629, 632) shows that Ford had *no* out-of-state income during the period in which the instant controversy arose and the termination occurred.

4. EVIDENCE OF ADDITIONAL PURCHASES FROM OUT-OF-STATE BY FORD

Petitioner thinks so little of the evidence of purchases of unrelated products by Ford from out-of-state (T. 431-34) that it barely mentions it in its petition. (Petition, p. 15.) These purchases by Ford of "other building material" or "other supplies and items" to be sold to Ford's customers may very well demonstrate its involvement with goods in the flow of interstate commerce, but these "goods" have nothing to do with the acts complained of, with PABCO roofing products or Fibreboard, itself, in any respect whatsoever. Ford's insistence on this testimony at trial, and petitioner's reliance on it here, demonstrates, again, the recurrent misconception that Ford could satisfy the re-

quirements of the Sherman Act by demonstrating merely that Ford, itself, in any respect, was engaged in interstate commerce.[21]

Thus, it can be appreciated that under either the "clearly erroneous" standard of review of the trial court's evaluation of this evidence, or the "most favorable to plaintiff" standard, Ford's showing of interstate commerce involvement was wholly deficient and incapable of supporting the essential interstate commerce nexus upon which a Sherman Act verdict must rest. The trial court concluded that the evidence was "wholly insufficient" (344 F. Supp. at 1329) and "as thin as we have ever seen on an interstate commerce issue". (*Id.*, p. 1327.) Fibreboard maintains that the trial court was manifestly correct in its appraisal of the weight and sufficiency of the evidence on interstate commerce involvement and applied the correct and prevailing legal criteria to that evidence.

SUMMARY OF ARGUMENT

Ford failed to carry its burden of proof in this case by introducing sufficient evidence to support a finding of the requisite involvement of interstate commerce. The trial court so found and the Court of Appeals affirmed, denying a petition to reconsider upon an application for rehearing *en banc*. Petitioner now attempts to salvage the case by misstating the evidence in an attempt to create the illusion that there is a legal issue present that meets this Court's criteria for review. Petitioner's attempts are transparent and unavailing.

The decisions of the lower courts do not present a conflict with the applicable decisions of this Court on the question of interstate commerce involvement under Section

21. See footnote 16, above.

1 of the Sherman Act. On the contrary, both the trial court and the Court of Appeals followed precisely this Court's requirement that the facts presented are to be analyzed to determine if there is the requisite interstate involvement.

The trial court found that the acts complained of by Ford were not in the flow of commerce. The roofing insulation was neither a PABCO product, nor was it covered by the termination notice. Likewise, there was insufficient evidence to support any finding as to any PABCO products (or otherwise) that Ford's termination had any effect on interstate commerce.

The decisions below do not conflict with *decisions* of other circuits. The only conflict is that the facts in this case do not support a finding of interstate involvement, while the facts in some cases in other circuits, as well as the Ninth Circuit, do support such a finding and some do not.

Petitioner's last desperate rescue attempt is equally without merit. The issue of interstate commerce is the underlying basis for every Sherman Act case, and the actions of Ford's counsel fully demonstrated awareness of this elementary point and the obligation to introduce jurisdictional facts to establish involvement in interstate commerce.

ARGUMENT

At the outset, petitioner has misstated the evidence as found by the trier of fact (Petition, p. 16; compare 344 F. Supp. at 1327-28), and has recited as conclusive what the trier of fact found could not be supported by evidence. (*Id.*) From this point the petitioner invites this Honorable Court's review of the application of *petitioner's* version of the facts to the law. Petitioner seeks nothing less than a new trial by the Supreme Court of the United States.

The trial court, as finder of fact, did *not* find that shipments were made from Oregon to California during periods

of shortages when competition between Ford and its competitors was most intense, and the trial court did *not* find any instance of roofing materials having been sold to Ford and then delivered to Oregon from California. To the contrary, it found that there was insufficient evidence to warrant *any* finding, and it found the evidence respecting roofing insulation sales insufficiently related to Fibreboard's termination of Ford's PABCO distributorship to be material to the issue of involvement in interstate commerce *of the acts complained of.*

For these reasons most of petitioner's argument (Petition, pp. 17-40) is purely a treatise on the subject without relation to the case, as presented, in the factual context set and determined by the trial court and affirmed by the Court of Appeals. Nevertheless, we will respond to the arguments made, pointing out where those arguments mislead because they were based upon erroneous assumptions with respect to the evidence and facts as found and determined by the trial court.

I. There Is No Conflict Presented With Decisions of This Court Respecting the Prerequisite Involvement With Interstate Commerce Under Section 1 of the Sherman Act.

Petitioner argues that the decisions of the lower courts conflict with the pronouncements of this Court respecting the reach of interstate commerce in Section 1, Sherman Act cases. To illustrate its point, however, petitioner relies upon analysis presented in cases *not* decided under the Sherman Act.[22] But the analysis is not appropriately the same.

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22. Perez v. United States, 402 U.S. 146 (1971); Maryland v. Wirtz, 392 U.S. 183 (1968); Wickard v. Filburn, 317 U.S. 111 (1942); Cleveland v. United States, 329 U.S. 14 (1946); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

Even though Congress exercised its full power under the commerce clause in enacting the Sherman Act, as this Court stated over twenty years ago, "Congress . . . left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce [under] the Sherman Act", whereas, in other legislation "Congress itself has said that a particular activity affects commerce . . . [where] the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power". *United States v. Darby*, 312 U.S. 100, 120-121 (1941). It is entirely clear from the cases relied upon by petitioner that the legislation there involved was of the type last-mentioned above in the quote from *United States v. Darby*. This is borne out by those cases.

In *Katzenbach v. McClung, supra* at 302-303, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), and *Wickard v. Filburn*, 317 U.S. 111 (1942), the very distinction made in *United States v. Darby*, above quoted, is set out and relied upon for the proposition that the statute involved was of the second class, *unlike the Sherman Act*, where Congress determined for itself that a particular class of activity burdens the flow of interstate commerce and made no provision for a case-by-case factual determination. The same is true of *Perez v. United States*, 402 U.S. at 152-154, wherein the *Heart of Atlanta Motel* and *Katzenbach v. McClung* cases are discussed in the same vein, along with *Maryland v. Wirtz, infra*. An examination of the *Wirtz*[23] case reveals

23. In *Wirtz* the Court dealt with the same statute, the Fair Labor Standards Act, which was the subject of United States v. Darby, *supra*, and stated, regarding the case before it and Wickard v. Filburn, "Neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." (392 U.S. at 197, n. 2.)

the same distinction from the Sherman Act is present with respect to the statute there involved. See also *In re Western Liquid Asphalt Cases*, 487 F.2d 202, 205 (9th Cir. 1973). The *Cleveland* case involved no issue of whether interstate commerce had been employed in the acts complained of.[24]

The "class-of-activity" approach obviates any judicial examination of commerce involvement on a case-by-case basis. That has *never* been the law under the Sherman Act, as confirmed by *United States v. Darby*, *Katzenbach v. McClung*, and *Perez v. United States*, *supra*, and as demonstrated by this Court's analysis in *United States v. Yellow Cab Co.*, 332 U.S. 218, 230-233 (1947). There the factual showing made led this Court to the conclusion that the local taxicab service affected by the conduct complained of was "too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act". (*Id.* at 230.) In the *Yellow Cab Co.* case, however, this Court made a specific point of reserving from its conclusion any intimation that it meant "to establish any absolute rule that local taxicab service to and from railroad stations is completely beyond the reach of federal power or even beyond the scope of the Sherman Act" or that "all conspiracies among local cab drivers are so unrelated to interstate commerce as to fall outside the federal law". Rather, this Court stated further that under other factual circumstances such a conspiracy as complained of in the case before it "might have sufficient effect upon interstate

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24. In *Cleveland* the issues were whether the Mann Act's prohibition against transporting a woman in interstate commerce for "any . . . immoral purpose" included such transit for the purpose of polygamous marriage and whether the requisite "immoral purpose" was, in fact, present in that case. (329 U.S. at 18, 19.)

commerce to justify imposition of the Sherman Act. . . ." (*Id.* at 232-233.)[25]

There is, therefore, no "class of activity" defined in the *Sherman Act, Section 1* as to which the courts "have no power to excise, as trivial, individual instances" (*Maryland v. Wirtz*, 392 U.S. 183, 193 (1968); *Perez v. United States*, 402 U.S. 146, 154 (1971)). It is, in each instance, for the court to determine *from the evidence presented* whether a particular incident is or is not sufficiently "in the flow" of, or has a substantial enough effect upon, interstate commerce to bring it within the compass of Section 1 of the Sherman Act. Petitioner's "class of activity" approach would obviate *any* consideration of the interstate commerce criterion of the Sherman Act, Section 1.[26]

That the determination of interstate commerce involvement is a highly factual matter, subject to proof in each case involving Section 1 of the Sherman Act, is demonstrated further by the extensive analysis of *Manderville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), one of the cases petitioner seeks to enlist in support of its "class of activity" theory. (Petition, pp. 17, 19, 22.) In *Manderville Island Farms, Inc.*, and its reference to dicta in *United States v. Frankfort Distilleries*, this Court stated:

> "[T]he inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total

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25. To like effect is Yellow Cab Co. of Nevada v. Cab Employees Local No. 881, 457 F.2d 1032 (9th Cir. 1972), upon which the trial court in the instant case relied (344 F. Supp. at 1326, n. 1, 1328-29).

26. The "class of activity" petitioner advocates as applicable here under the Sherman Act is never clearly delineated, but appears to be *per se* illegal concerted refusals to deal (Petition, pp. 34-35). Such a class *could not* be applied here in the light of the trial court's determination, *as a matter of law*, that there is insufficient evidence to support any finding of *per se* illegal restraint in this case. (344 F. Supp. at 1326, n. 1.)

economic process is now merely a preliminary step, *except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented.*[14]

• • •

14. In *United States v. Frankfort Distilleries*, 324 U.S. 293, 297, we said, 'It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Antitrust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce'. [Case citations omitted.]" (334 U.S. at 234—emphasis added, footnote the Court's.)

The Court's *per curiam* decision in *Burke v. Ford*, 389 U.S. 320 (1967), also relied upon by petitioner (Petition, pp. 19, 21, 22) follows the same analysis as, and cites, *Manderville Island Farms, Inc., supra*, in stating, "it is well established that an activity which does not itself occur *in* interstate commerce comes within the scope of the Sherman Act if it substantially *affects* interstate commerce". (389 U.S. at 321.)

The trial court herein, and the Court of Appeals, followed this precise formula for analysis of the factual presentation made by Ford. This two-pronged analysis was specifically articulated twenty years ago in *Las Vegas Merchant Plumbers Ass'n. v. United States*, 210 F.2d 732, 739-740, n. 3 (9th Cir. 1954), cert. denied, 348 U.S. 817:

> "(1) That the acts complained of, occurred within the flow of interstate commerce. This is generally referred to as the 'in commerce' theory.
>
> (2) That the acts complained of, occurred wholly on the state or local level, in intrastate commerce, but substantially affected interstate commerce.
>
> Under both of these theories, the transactions complained of must affect or have an effect on interstate

commerce or the requirements of the statute are not satisfied."

The trial court (344 F. Supp. at 1325-26) endorsed by the Court of Appeals (493 F.2d at 1205) here recognized these criteria as controlling.

These criteria represent the full exercise of Congress' power over interstate commerce. (210 F.2d at 739-40.)[27] That power reaches beyond the actual flow of interstate commerce to all activities occurring before or after (or outside) the flow which have a substantial effect on the flow of commerce—thus the "affect commerce" test as stated by this Court in *Burke v. Ford*, *supra* at 321. This latter test requires an evidentiary demonstration of a quantitatively significant impact upon interstate commerce in order for the requisite involvement with interstate commerce to be present.[28] The trial court found, as the trier of fact, that Ford had made no demonstration of any significant impact on commerce (344 F. Supp. at 1325). In fact, Ford contended before the trial court that the "substantial effect on commerce" theory was inapplicable, and petitioner does not argue here that the evidence demonstrated any substantial impact on interstate commerce. Instead, petitioner relies solely on its contention that no demonstration of impact on commerce was necessary because the "in commerce" theory applies, regardless of the

27. Citing United States v. Frankfort Distilleries, 324 U.S. 293, 298 (1945); United States v. Southeastern Underwriters Ass'n., 322 U.S. 533, 558 (1944); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 235 (1948); and United States v. Chrysler Corp., etc., 180 F.2d 557, 560 (9th Cir. 1950).

28. *Id.* See also Las Vegas Merchant Plumbers Ass'n. v. United States, *supra* at 210 F.2d at 747, 748.

29. See note 15, supra.

insufficiency of Ford's evidentiary demonstration.[30] In any event, the "substantial effect on commerce" theory was intentionally waived before the trial court, and not argued to the Court of Appeals, and may not now be resurrected as the subject for invocation of this Court's jurisdiction on certiorari. *Helvering v. Minnesota Tea Co.*, 296 U.S. 378, 380 (1935); *Helvering v. Wood*, 309 U.S. 344, 348-49 (1940); *Virtue v. Creamery Package Co.*, 227 U.S. 8, 38 (1913).

II. The Evidence Showed No Involvement in the Flow of Goods in Interstate Commerce.

Petitioner details in its petition (at pp. 22 through 35) the task it asks this Court to undertake—a revaluation of the evidence and determination of the findings of fact pertinent to the interstate commerce issue. Realizing well that this is not a function the Court normally undertakes within its discretionary jurisdiction, especially where, as here, two lower courts have appraised and agreed upon the significance of the evidence in this regard, nevertheless Fibreboard responds to the rearguments of the evidence (rather than Reasons for Granting a Writ, as billed—Petition, p. 16) offered in the petition.

At the outset (Petition, p. 22) petitioner states, erroneously, that its version of the facts—set forth in its Statement of Facts—is undisputed. This is not true, as we have

30. Only by enlisting, under its "class of activity" approach, the entire substance of every past, present and future, though entirely unrelated, instance of a *per se* illegal concerted refusal to deal (even though the trial court found, as a matter of law, no sufficient basis in the evidence for application of the *per se* illegal doctrine in this case—344 F. Supp. at 1326, n. 1), could petitioner muster enough arguable *theoretical* impact on interstate commerce to maintain a substantial effect on commerce may be felt. There is, of course, no evidence of such *theoretical* impact in the record of this case to support even that argument.

detailed above (pp. 8-20).[31] More important, however, is that its version of the two elements it relies on to demonstrate an involvement of the acts complained of in the "flow of interstate commerce" is contrary to what was found by the trier of fact—the trial court—and affirmed by the Court of Appeals. There was *no* finding of movement of roofing materials from Fibreboard's Portland, Oregon plant to Ford; rather the trial court noted the evidence fell short of demonstrating *any* flow of such materials to Ford, or of even a single instance of Ford's ordering or receiving such materials. Moreover, the trial court noted that the "roofing materials" were never shown to have been of the sort covered by the Ford wholesale distributorship arrangement, the termination of which was the act complained of in this lawsuit. (344 F. Supp. at 1327.) Therefore, even if the trial court had had before it evidence of movement of "roofing materials" from Oregon to Ford, and had made a finding thereon, which it could not and did not, there was no basis for relating that movement to the termination of Ford's wholesale distributorship arrangement for PABCO Asphalt Roofing Products.

The "roofing materials" from U.S. Gypsum and Kaiser in Oregon and Washington were roofing insulation mate-

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31. For example, the so-called undisputed evidence of roofing materials moving from Fibreboard's Portland, Oregon, plant to Ford was disputed by Ford's own president, who, in answer to the trial court's question, "As far as the Fibreboard product, that you bought from Fibreboard. That was PABCO. As I understand they were manufactured in California", gave the only evidence on the source of PABCO materials actually purchased by Ford—"Yes, sir. They were". (T. 434, see p. 15, above.) Also, the so-called undisputed oral evidence of Ford's resale of Fibreboard roofing products to a customer in Oregon was disputed by the testimony of Ford's own sales manager, who could recall no such instance during his entire tenure, which was coextensive with the corporate life of Ford (T. 277), and by the "undisputed facts" stipulated to in the pretrial order. (R. 433, see pp. 18-19, above.)

rial—specifically so identified in the testimony (see pp. 12-13, above) and so found by the trial court (344 F. Supp. at 1329), as to which Fibreboard acted only as a middleman seller. They were *not* covered by the wholesale distributorship arrangement between Ford and Fibreboard, the termination of which was the act complained of in this case, and there was no claim or evidence that Fibreboard ever refused to sell such insulation materials to Ford—the subject of the refusal and termination herein being solely PABCO Asphalt Roofing Products.

The trial court found that after Ford's termination as one of Fibreboard's wholesale distributors of PABCO products "Ford continued to obtain this insulation material—either from its manufacturer or from other dealers—in the same manner as before the termination". (*Id.*) The trial court also found in this regard that the insulation material "was not a PABCO product and there is no evidence that it was among the kinds of products listed in the Fibreboard distribution policy statement (Ex[h]. 2) [T. 102, 104] *or covered by the termination notice*". (*Id.*—emphasis added.) Petitioner characterizes these findings of the trial court as establishing that "Ford was *not able* to purchase these interstate materials from Fibreboard" and Ford *found it necessary* to obtain this material from the manufacturer or from other dealers". (Petition, p. 24—emphasis added.) There is no evidence, and the trial court's findings are to the contrary, that Fibreboard *ever* refused to sell roofing *insulation* material to Ford. The point of the trial court's finding is that Ford's ability to get roofing insulation material was not affected *at all* by the termination of Ford's wholesale distributorship for PABCO products.

Therefore, petitioner's whole argument (Petition, pp. 25-31) stemming from its premise, *not* established in this

case as a factual matter, that "defendants' [sic] termination of plaintiff operated directly on goods which, prior to the termination, 'flowed' from defendant Fibreboard to plaintiff" (*Id.*, p. 25) is not supported in the evidence or facts as found in this case.

This Court has often stated it will not engage in advisory opinions on questions of law, important or otherwise, not grounded in an actual case or controversy. *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 284 (1969); *United States v. Fruehauf*, 365 U.S. 146, 157 (1961); *Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945) ("It has long been [the Court's] considered practice not to . . . formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied.") The instant petition seeks to induce such an exercise by a distortion of the record evidence and the facts as found by the trier of fact.[32]

Concomitantly, it is apparent the trial court and the Court of Appeals properly applied correct principles of law to the facts, as found, for determination of whether the acts complained of were "in the flow" of commerce. See *Gough v. Rossmoor Corporation*, 487 F. 2d 373 (9th Cir. 1973) and *Yellow Cab Co. of Nevada v. Cab Employees Local No. 881*, 457 F. 2d 1032 (9th Cir. 1972), the princi-

32. Footnotes 3 and 4 of the petition (pp. 24, 28) demonstrate petitioner's distortion of even the *function* performed by the trial court, as trier of fact on the interstate commerce issue (recently specifically approved as a proper role for the court in Gough v. Rossmoor Corporation, 487 F.2d 373, 377 (9th Cir. 1973) and Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co., 469 F.2d 416 (5th Cir. 1972)). The trial court weighed the evidence and found it insufficient to support any reasonable finding of involvement in interstate commerce. On review that process may be reversed *only* if "clearly erroneous".

ples and analysis of which the Court of Appeals and trial court applied and followed in this case.

There is no conflict with *Binderup v. Pathe Exchange*, 263 U.S. 291 (1923), wherein this Court found sufficient allegation of the requisite involvement in interstate commerce in the complaint by reason of averments that:

> 1) A conspiratorial refusal to deal existed among film distributors, located in different states; the act complained of involved film contracts interstate in nature as to parties participant and the business transacted thereunder (263 U.S. at 309); and
>
> 2) The act complained of put an end to the plaintiff's participation in that business affecting the movement of films in interstate commerce to plaintiffs and, thereby, operating in the channels of interstate commerce. (*Id.* at 311-312.)

Each of these factual allegations was, of course, accepted as true for purposes of testing the sufficiency of the averments of the complaint—the only issue before the Court. Here, by way of contrast, Ford *failed to prove* any operation of the act complained of in, or substantially affecting, interstate commerce, under principles of law consistent with the *Binderup* case's analysis. Again, petitioner takes liberties with the evidence and the facts as found in stating (Petition, p. 30) that Ford's termination as a PABCO distributor "prevented it from purchasing from Fibreboard . . . products made in Washington and Oregon." There was no prevention as to the products shown to have originated out-of-state, and there was no out-of-state origin shown as to the PABCO products with which Ford's termination was solely concerned.

Similar to *Binderup*, in the *Klor's, Inc.* and *Radiant Burners, Inc.* cases, relied upon by petitioner (Petition, p.

30), the scheme or concerted conduct complained of operated, unquestionably, directly in the channels of interstate commerce.[33] In neither case was there presented any issue respecting involvement in interstate commerce—the issue in both being whether sufficient *public injury* was involved to constitute an actionable wrong under the Sherman Act.

The fact that only Ford, a single dealer, was involved in the acts complained of is *not* the basis upon which either court below reached its decision. The basis was that the acts, themselves, were not operative in interstate commerce or directed at interstate commerce, and Ford, itself, in the aspects of its business germane to the acts complained of, was not engaged in interstate commerce.

No issue of involvement in interstate commerce was presented in *United States v. McKesson & Robbins*, 351 U.S. 305 (1956), where the defendant's price maintenance scheme operated through 74 wholesale divisions in 35 states. (*Id.* at 306), or in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), where the price-fixing scheme pervaded at least five states and involved defendants operating in ten different states. (*Id.* at 166).

In *United States v. Women's Sportswear Mfg. Assn.*, 336 U.S. 460 (1949), quoted from on pages 28 and 29 of the petition, this Court determined interstate commerce involvement on the "substantial effect on interstate commerce" as distinct from the "in the flow of interstate commerce" analysis relied upon below by Ford.[34] This Court there

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33. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) and Radiant Burners, Inc. v. People's Gas Light & Coke Co., 364 U.S. 656 (1961). In *Klor's*, another pleading case, essentially, ten nationwide appliance concerns allegedly conspired with a department store to withhold their products from a discounter. *Radiant Burners*, also a pleading case, follows *Klor's* and alleged a multi-state conspiracy to prevent interstate sales of the plaintiff.

34. See note 15, above.

noted (336 U.S. at 464), "The business affected by the restraint is interstate commerce. The volume affected is substantial." In contrast, the trial court here found (344 F. Supp. at 1325):

> "Plaintiff, however, makes no . . . contention in this case nor is there any evidence that these intrastate transactions [sales of PABCO Asphalt Roofing Products to Ford which were manufactured at Fibreboard's Martinez, California, plant] actually affected interstate commerce substantially *or otherwise*." [Emphasis added.]

III. The Evidence of Out-of-State Shipments Was Insufficient.

The trial court found the evidence not only insubstantial as to impact of interstate commerce, but it found the evidence offered on involvement of the acts complained of "in the flow of interstate commerce" was

> "as thin as we have ever seen on an interstate commerce issue [and], falls far short of supporting a finding that defendants' termination of the otherwise intrastate transactions and relationship of the parties occurred 'within the flow' of interstate commerce." (344 F. Supp. at 1328.)

It further found, upon the entire record:

> "there is no substantial evidence that the termination significantly interrupted Ford's ability to obtain roofing material *except* the Pabco Asphalt Roofing Products manufactured at Martinez which it had been theretofore regularly receiving in an *intrastate* relationship under the terms of its Pabco distributorship arrangement.
>
> "There is no substantial evidence of any significant interference with any roofing materials which could be fairly said to have been 'in the flow' of interstate commerce. [Footnote omitted.]" (*Id.*)

Only as an alternative to the foregoing did the trial court *assume* a *per se* violation in the case[35] and that some out-of-state materials did remain "within the flow of interstate commerce" in some sense germane to this case,[36] and, even then, it concluded that the quantum of *evidence* was so meagre as to be legally insufficient to support any finding other than that the acts complained of were directed at intrastate rather than interstate activity (*Id.* at 1328-1329.)

Petitioner, undaunted by the thoroughness of the trial court's explication of the deficiencies of the evidence, states, erroneously and contrary to the trial court's decision, that a *per se* violation "has already been established herein." (Petition, p. 31.) Then, assuming the further premise, also contrary to the trial court's findings, that some involvement of goods in the flow of interstate commerce has been demonstrated herein, petitioner urges reversal because the quantity of goods involved is immaterial. (*Id.*) The trial court *agreed* with that as a conclusion of law on the factual premises assumed by petitioner. (344 F. Supp. at 1326-27.) It is the petitioner's assumptions of facts contrary to the findings which presents an *apparent* issue of law.

There follows (Petition, pp. 31-32) a recital of further "facts" respecting the nature and timing of out-of-state shipments and competitive conditions in Ford's market for resale, without benefit of any support in or reference to the record. From these new premises, contrary to the findings the record and even common sense,[37] petitioner conjures a

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35. Which the trial court, in fact, *found*, as a matter of law, *not* to be supportable by the evidence. (344 F. Supp. at 1326, n. 1.)

36. Also contrary to what the trial court *found* to be the case, as quoted next above.

37. Petitioner states that in a period of shortage of PABCO roofing materials "competition between Ford and other distributors grew so intense," and that it follows that Ford's termination

"competitively important interstate supply of materials," relying upon an out-of-context quote from *Simpson v. Union Oil Co.*, 377 U.S. 13, 16 (1963)—another case in which there was no issue as to involvement in interstate commerce. Where quoted, the Court in *Simpson* was addressing the same question respecting the elements of *an actionable wrong* under Section 1 of the Sherman Act as was presented in *Klor's, Inc., supra,* and *Radiant Burners, Inc., supra* (both of which the *Simpson* opinion cites)—significance of the public injury involved. This is a different concern than whether the acts causing that injury occurred in or had sufficient relationship to interstate commerce so as to invoke the coverage of Section 1 of the Sherman Act. See *Gough v. Rossmoor Corporation, supra* (referred to as *Rosen v. Rossmoor Corporation*), quoted at length and followed in the Court of Appeals' opinion in this case (493 F. 2d at 1205).

Burke v. Ford, 389 U.S. 320 (1967), a case determined under the "substantial effect on interstate commerce" test, is inapposite here in support of petitioner's claim that the evidence was sufficient to find involvement in interstate commerce under the "in flow" test. In any event, the "substantial volume" in *Burke* was $45,000,000 in annual purchases on a state-wide basis of liquor *entirely* originating from out-of-state. (*Id.* at 321, n. 1). Here, by way of con-

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"bore directly on the vigor of competition in the relevant Northern California market." (*Id.* at 32.) Further detail of this logic is set out at page 33— one less customer (Ford); less demand for PABCO; less shortage of PABCO; less need for shipments from Oregon; equals a reduction in "interstate sales and delivery" of PABCO. Both assume a condition of recurring shortages, contrary to the only testimony on the subject that a *temporary* condition of shortage was cured (T. 80, 92). It is also difficult to see any inherent logic in either of these lines of reasoning without some factual basis as to the amount, frequency, composition and timing of these out-of-state shipments—as to which Ford, with the burden of proof, made no showing.

trast, there is no evidence of the volume of goods from out-of-state even conceivably involved in and affected by Ford's termination by Fibreboard. The *Burke* case is like the *Gough* (or *Rosen*) case, *supra,* distinguished on its facts by the Court of Appeals' opinion in this case, wherein "carpeting coming into California from other states could not meet their destined use . . .". (493 F. 2d at 1206.) Here there is no evidence of any material from out-of-state that was or could have been affected by Ford's termination as a distributor of PABCO Asphalt Roofing.

Petitioner seeks to negate *any* "de minimis" limit to the showing required of goods moving in the flow of interstate commerce by calling the showing it says it has made "competitively significant", on the basis of the purest surmise, unaided by any evidence (let alone findings of fact), and by reenlisting its "class of activities" approach from non-Sherman Act cases arising under totally different legislative mandates (see pp. 22-25, above). The trial court did *not* rest its decision on the "de minimis" *amount* of *demonstrated* interstate movement of goods pertinent to the acts complained of. Rather it found *no* sufficient evidence of *any* pertinent movement. (344 F. Supp. at 1328.) Only, alternatively, did the trial court, on "assumptions" contrary to its own findings, reach the conclusion that some "miniscule" interstate movement of out-of-state goods to Ford might be found. From this the trial court deduced that the acts complained of *could not* have been directed to Ford's interstate, but *must have been* directed to its intrastate, business, following analysis set down by *Yellow Cab Co. of Nev. v. Cab Employees Local No. 881,* 457 F. 2d 1032 (9th Cir. 1972). Consistent with the analysis of this Court in *United States v. Yellow Cab Co.,* 332 U.S. 218, 225, 231 (1947), and that in *United States v. The Bensinger Co.,* 430 F. 2d 584 (8th Cir.

1970), the court of appeals in the *Cab Employees* case, and the trial court here, recognized that if it is otherwise clear that a *per se* illegal conspiracy is directed at interstate commerce[39] the amount of goods involved is unimportant. However, in both the instant case and the *Cab Employees* case, it was *not* otherwise clear. In that event, the trial court here, like the court of appeals in the *Cab Employees* case, determined that even the *professed* interstate movement of out-of-state roofing materials to Fibreboard in the San Francisco Bay Area was *de minimis to* the *intrastate* busi-

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39. In the *Bensinger* case the price-fixing conspiracy, a *per se* violation, was directed to a single dishwashing machine that moved in interstate commerce pursuant to the order of its out-of-state agent, which *movement* was *directly* threatened by the operation of the conspiracy. The scheme was *per se* illegal and it was specifically directed at goods moving in interstate commerce. The same was true of the restraint of cab purchases in the *Yellow Cab Co.* case (332 U.S. at 225), but as to the alleged restraint of intracity cab operations in that case, this Court held that the commerce against which the alleged conspiracy was directed was "too unrelated" and had only "casual and incidental" relationship to interstate commerce. (332 U.S. at 230, 231.) It may be noted that the Court in the *Bensinger* case emphasized that "Were the price-fixing agreement to have occurred in intrastate commerce, it would be necessary to show a substantial impact on interstate commerce." (430 F.2d at 589, n. 3.) Here Ford failed to show any operation of the acts complained in interstate commerce and did not even profess any showing of any "substantial impact" on interstate commerce—failing to adduce adequate evidence to support either theory.

This case is, therefore, remarkably like Uniform Oil Co. v. Phillips' Petroleum Co., 400 F.2d 267 (9th Cir. 1968), wherein the court of appeals affirmed a directed verdict because the plaintiff "failed to offer adequate proof that the activity in question was in interstate commerce or had a substantial effect upon interstate commerce." (*Id.* at 269.) There, as here, the alleged illegal activities occurred in a wholly local, intrastate environment, and, therefore, plaintiff had to, but failed to offer "the required proof that the effect [on interstate commerce] was 'not insubstantial.'" (*Id.* at 270.) Recounting evidence no leaner than that in this case, the court noted the "manifest insufficiency of evidence upon the record," and held "the absence of such indispensable proof deprived the District Court of jurisdiction over the Sherman Act claims." (*Id.*)

ness affected—confirming its conclusion that the acts complained of not only occurred in but were directed at the intrastate business. (344 F. Supp. at 1329.) The trial court then added that, even on the assumptions made, contrary to its own findings, respecting a *per se* violation and the movement of out-of-state roofing materials to Fibreboard in the San Francisco Bay Area:

> "All that really appears in this case is [Ford's] claim that it has been somehow precluded from purchasing some items of unspecified nature and unspecified amount (and, therefore, presumably a minimal amount) occasionally brought from Portland to Martinez [California] but—so far as the evidence shows—never even purchased by Ford.
>
> "It would be straining, indeed, to hold that a bare possibility that Ford might at some time acquire one or more of such items would transform an otherwise purely intrastate relationship into an interrupted "flow" of interstate commerce."

In this context, and for the purposes employed in the trial court's reasoning process, the *de minimis* treatment of Ford's professed foreclosure from roofing materials originating out-of-state was equivalent to this Court's finding of only "casual" or "incidental" relationship between interstate commerce and the intrastate commerce affected in *United States v. Yellow Cab Co., supra*, 332 U.S. at 231, and was, therefore, fully consistent with the precedents of this Court. See also *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 502 (1969), which specifically recognizes the propriety of a "de minimis" cut-off level, but held that calculation of the amount of commerce restrained should look to the entire area where the conduct operates. Here that would be coextensive with only this

particular plaintiff and defendant. In *Fortner* it was broader.

IV. There Is No Conflict Among Circuits Introduced by the Decisions Below.

Perhaps the leading court of appeals decisions in the nation on the subject at hand are *Las Vegas Merchant Plumbers Ass'n. v. United States*, 210 F. 2d 732 (9th Cir. 1954), cert. denied, 348 U.S. 817, and *Page v. Work*, 290 F. 2d 323 (9th Cir. 1961), cert. denied, 368 U.S. 875,[40] both of which cases the trial court and Court of Appeals followed in the instant case. The *Page* case has been recently approved in *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F. 2d 416, 418 (5th Cir. 1972), which was decided six months after *Lehrman v. Gulf Oil Corp.*, 464 F. 2d 26 (5th Cir. 1972), cert. denied, 409 U.S. 1077, that petitioner represents is in conflict with the *Page* case and the instant case. (Petition, pp. 36-39.)[41] It should

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40. Beyond the numerous decisions of the Ninth Circuit which approve and follow the principles announced in these decisions are the following decisions in other circuits: Doctors, Inc. v. Blue Cross of Greater Philadelphia, 490 F. 2d 48, 50, 54 (3d Cir. 1973); Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co., 469 F. 2d 416, 418 (5th Cir. 1972); United States v. The Bensinger Co., 430 F. 2d 584, 588, 590-91 (8th Cir. 1970); Lieberthal v. North Country Lanes, Inc., 332 F. 2d 269, 271, 272 (2d Cir. 1964); Cook v. Ralston Purina Company, 366 F. Supp. 999, 1009, 1010 (M.D. Ga. 1973).

41. Cook v. Ralston Purina Co., 366 F. Supp. 999 (M.D. Ga. 1973), which petitioner also argues conflicts with *Page*, arises in the same Fifth Circuit, follows and applies the principles enunciated in Las Vegas Merchant Plumbers Ass'n. v. United States, supra (see Note 40, above), as did the lower courts here, and involved a factual situation entirely different from this case. Like in Rasmussen v. American Dairy Ass'n., 472 F. 2d 517 (9th Cir. 1973), the *Cook* court found that *all* the ingredients for the restrained product marketed intrastate came with a continuity of flow from out-of-state through the massive interstate operations of defendant Ralston Purina Company (366 F. Supp. at 1009-1010.) Citing neither the *Lehrman* nor *Rosemound* cases on this issue

be noted also that, so far as we can find, neither the *Lehrman* case nor the *Rosemound* case has been subsequently cited for their discussions of the principles applicable to the determination of involvement with interstate commerce under the Sherman Act, either within or without the Fifth Circuit.

In any event, the instant case did not present either factual aspect considered determinative by the court of appeals in its "in commerce" and "effect on commerce" findings, respectively, in *Lehrman*. Abrupt withdrawal of the "TCA" price-support system for Gulftane gasoline, giving rise to the demise of Lehrman's business and the suit against Gulf, was found to be a "credible threat" to *all* Gulftane dealers of the consequence that would flow from failure to observe Gulf's suggested resale prices or competitive differentials. The TCA system was in effect through the entire country and the "threat" of its withdrawal as a coercive practice, injected by the *Lehrman* instance, had "untold geographical potential." (464 F. 2d at 32-33.) In other words, the court found that the conduct complained of by *Lehrman*, retaliative withdrawal of competitive pricing support, was *directed at* interstate commerce activity and became *operative in* the entire TCA system as a pending "threat." The impact was felt on all interstate commerce involved wherever the widespread TCA system operated. No similar widespread practice or system is here involved. The entire theory of the case as presented below is inconsistent with Fibreboard's refusal to sell to Ford in Oakland and eventual termination of Ford's distributorship having been motivated by a "coer-

(while, however, distinguishing *Lehrman* on another point—366 F. Supp. at 1013), and following *Las Vegas Merchant Plumbers Ass'n.*, the trial judge concluded there was a sufficient factual showing under the "in flow" theory.

cive threat" directed at *other* dealers in either the same or remote market areas.

Under the "affect commerce" theory the *Lehrman* court found, as a secondary ground for jurisdiction, that the demise of Lehrman's business caused related tires, batteries and accessories purchases from out-of-state to abruptly cease. The court considered Lehrman's *individual* purchases as significant over the long term and their loss as "significant" when his business was *ended* as the result of Gulf's conduct. It was on this very basis, the termination of out-of-state supplies (demonstrated in the evidence), that the *Lehrman* case distinguishes *Page v. Work, supra.* (464 F. 2d 35-36.)

Here all of the evidence from Ford's *own* witnesses indicates that the flow of "related" non-PABCO roofing insulation *continued,* as did Ford's *entire* business. Its sales of, among other things, non-PABCO roofing insulation purchased from out-of-state *increased.* There is *no* evidence here that Ford *ever* bought any of the PABCO products involved in the acts complained of from out-of-state, and, no evidence that the occurence or frequency of transfers of out-of-state products, if any, to the Martinez plant inventory were affected *at all* by cessation of sales to Ford under the wholesale distribution arrangement.

Thus, the *Lehrman* case would not indicate a result different from that reached by the trial court and the Court of Appeals in this case.[42]

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42. Petitioner states that the opinion in this case departs from "the prevailing view of liberally construing the interstate commerce requirement under the Sherman Act" evidenced by, among others, the case of Rosen (or Gough) v. Rossmoor Corporation, *supra* (Petition, p. 36, n. 5). This is indeed, curious in the light of the Court of Appeals' opinion herein, which quotes at length the principles articulated in that case and specifically affirms their consistency with the result reached here. (493 F. 2d at 1205.)

Having failed at trial to establish a basis for interstate commerce involvement, petitioner purports to *find* "here as in *Lehrman*" (Petition, p. 38) certain "uncontradicted evidence" that Fibreboard's interstate activities declined as a result of Ford's termination. The four elements of this evidence, as recited by petitioner, *do not exist*, either in the record or in fact,[43] and no citations to the record are offered for location of this non-existent evidence. This very lack of evidence, not cured by the mere conclusory, inaccurate statement that evidence exists, is the very basis for the lower court's action in setting aside the verdict and entering judgment for Fibreboard. Nothing petitioner has argued has corrected this deficiency in the slightest.

Finally, petitioner's contention that there is conflict with *United States v. The Bensinger Co., supra*, in the decisions of the courts below is untenable. As noted already,[44] the *Bensinger* case approves and follows the principles laid down by the *Las Vegas Merchant Plumbers Ass'n.* case, *supra*, which were, in turn, applied as the controlling principles by the trial court. (344 F. Supp. at 1326.) Moreover, the trial court followed the principles articulated in *Yellow Cab Co. of Nevada v. Cab Employees Local No. 881*, 457 F. 2d 1032 (9th Cir. 1972), which, in turn, discusses at length, approves and distinguishes on its facts the *Bensinger* case. In *Bensinger*, the *facts* demonstrated the oper-

43. There is *no* evidence *whatsoever* that Fibreboard sales to San Francisco Bay Area distributors included a "secondary source of supply . . . from Oregon," or what, if any, amount of roofing insulation Fibreboard purchased from out-of-state, before or after Ford's termination. There is also *no* evidence that Ford *ever* supplied any "out-of-state customer" with PABCO products manufactured in California, and no evidence of any occasion for it to do so either before or after termination. Neither does the record contain evidence of Fibreboard's *complete* sales to San Francisco Bay Area distributors before or after termination of Ford.

44. See footnote 40, above.

ation of the *per se* illegal scheme of price-fixing in the flow of interstate commerce (430 F. 2d at 588-589)—here and in the *Cab Employees* case they did not.

There is no conflict, but simply cases in which the facts demonstrate the application of different controlling principles from a common set of principles that are well established and operating with wide acceptance. With a number of cases within the Ninth Circuit, some finding the requisite involvement in interstate commerce[45] and some finding either a lack of evidence to support such a finding or no involvement on the established facts,[46] the Ninth Circuit *unanimously* denied rehearing *en banc* in this case (Petition, App. C), apparently perceiving no conflict in this circumstance. Petitioner has demonstrated here no more than the existence of different results in different cases embodying different facts. Such is not a proper occasion for this Court to exercise its power of review on certiorari.

V. The Issue of Interstate Commerce Involvement Was Properly Before the Trial Court.

Petitioner *also* asks this court to reverse the two lower courts' determinations that the interstate commerce issue

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45. See, e.g. Las Vegas Merchants Plumbing Ass'n. v. United States, supra; Cartrade, Inc. v. Ford Dealers Adv. Ass'n. of So. Cal., 446 F.2d 289 (9th Cir. 1971), cert. denied, 405 U.S. 997 (1972); Rasmussen v. American Dairy Ass'n., 472 F. 2d 517 (9th Cir. 1973); Gough v. Rossmoor Corporation, 487 F. 2d 373 (9th Cir. 1973) and In Re Western Liquid Asphalt Cases, 487 F. 2d 202 (9th Cir. 1973), cert. granted sub nom Gulf Oil Corp. v. Copp Paving Co., Inc., ... U.S. ....., 94 S.Ct. 1586, on issues other than involvement in interstate commerce under the Sherman Act.

46. See, e.g. Page v. Work, supra; Uniform Oil Co. v. Phillips' Petroleum Co., 400 F. 2d 267 (9th Cir. 1968); Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F. 2d 341 (9th Cir. 1969); John Kalin Funeral Home, Inc. v. Fultz, 442 F. 2d 1342 (9th Cir. 1971); and Yellow Cab Co. of Nev. v. Cab Employees Local No. 881, supra.

was properly before the court. (Petition, p. 40.) The trial court dealt with this contention by finding "there is nothing in the record to justify plaintiff's contention that any deficiency of evidence to support his [Ford's] interstate commerce allegation is due to plaintiff having been misled concerning the existence of the issue." (344 F. Supp. at 1324-25.) The "existence of the issue" is inherent in *any* case brought under the Sherman Act where the allegations of involvement in interstate commerce are not admitted. It is essential to the district court's jurisdiction under the Sherman Act.

After the trial court's order to cooperate in Ford's counsel's eleventh hour requests for evidence to support commerce involvement, Fibreboard made every effort to comply. (R. 954-55.) Information was obtained, but Ford's counsel never made any effort to *use* any of it. No evidence, other than verbal, *ever* came from Ford on the subject, even though its records were, presumably, more intact than Fibreboard's were three years after sale of its PABCO Division.

From the outset Fibreboard in its answer to Ford's complaint controverted the averments of involvement in interstate commerce. (R. 3, para. 8.—"The products so sold by defendant Fibreboard . . . to plaintiff are manufactured in part in states outside California and shipped into the State of California"; R. 148—"Denies the averments of paragraphs 8 and 9, except admits . . . that it manufactures and sells roofing products outside the State of California.") Nothing thereafter suggests a departure. Before any pretrial order was entered, Ford filed its pretrial statement asserting that all discovery for Ford was completed and that it needed no further trial preparation. (R. 265.) Ford's counsel should have been, and *was*, aware that jurisdictional

facts showing involvement in interstate commerce would have to be proved.

In no sense is the awareness of counsel that he has to prove a basis for *jurisdiction* akin to whether damages can be claimed for future problems in childbirth because of an allegation of pelvic injury. *Walker v. West Coast Freight, Inc.*, 233 F. 2d 939 (9th Cir. 1956). (Petition, p. 40.) The latter case is simply not in point.

That it knew the issue had *not* been proved was evident from Ford's withdrawal of the issue from the jury (344 F. Supp. at 1325) and its subsequent posture now that the issue can be somehow deemed *established,* if not by estoppel or waiver, by a bare showing of a sufficiency for submittal to the jury (Petition, pp. 24, 28).

There is no substance to this "fall-back" posture and Ford must bear the consequences of its *own* failure to produce critical evidence essential to its case. There is neither substance nor justification for petitioner's prayer of this Court that it grant certiorari, reverse and remand so that Ford can have an additional attempt at proving "the effect of defendant's conduct on interstate commerce." (Petition, p. 41.)

CONCLUSION

As there is in this case no appropriate basis for invocation of this Court's discretionary review powers, it being simply a case of Ford having failed to carry its burdens of proof by eliciting adequate evidence to support a finding on interstate commerce involvement, and, inasmuch as the petitioner is not even a party who has statutory standing to request the issuance of a writ of certiorari for review of any part of this case, Fibreboard respectfully asks that this Honorable Court deny the instant petition.

Dated: August 9, 1974.

Respectfully submitted,

E. Judge Elderkin
Thomas A. Welch
Brobeck, Phleger & Harrison
Attorneys for Respondent